United States Court of Appeals

for the Second Circuit

APPENDIX

76-7476

United States Court of Appeals
For The Second Circuit

No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees Cross-Appellants,

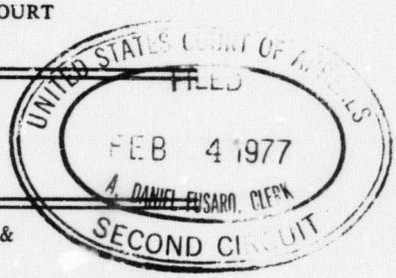
NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

B

P/s



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PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

JUDGE OWEN

71 CIV. 685

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
NEUBURGER, LOEB & CO. INC. AS ASSIGNEE OF CLAIMS OF DAVID BUCKLEY AND MARY BUCKLEY AGAINST. CHARLES GROSS, MABEL BLEICH AND GROSS & CO. defts NEWBURGER, LOEB & CO. a New York Ltd. Partnership ANDREW M. NEWBURGER ROBERT L. NEWBURGER LEO STERN ROBERT L. STERN RICHARD D. STERN JOHN F. SETTEL HAROLD J. RICHARDS SANFORD ROGGENBURG ADOLPHUS ROGGENBURG NED D. FRANK ALEX AIXALA - 10-10-75 FRED KAYNE ROBERT MUH PAUL RISHER CHARLES SLOANE ROBERT S. PERSKY FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership and LAWRENCE J. BERKOWITZ, Additional Defendants on Counter-claims.	For plaintiff: FINLEY, KUMBLE, UNDERBERG, PERSKY & RO 477 Madison Avenue, N.Y.C.N.Y. 10022 371-5900 Paul, Weiss, Rifkind, Wharton & Garris 345 Park Ave (for Addit. Deft. Finle N.Y. 10022 on counterclaims) 644-8000 LAWRENCE J. BERKOWITZ PRO SE. 10717 Wilshi B oulevard , Los Angeles, Calif. 90024 213 474- 0 11/13/74 Schaeffer Dale Vogel & Tavrow 410 Park Avenue, NYC 10022 PL8 8000(A For defendant: GOLDEN WIENSHIENK & MANDEL 10 East 40th St. New York 10016 (74-3760 Hart Hune (for Robert S. Persky and Kumble, Underberg, Persky & Roth) 10 East 40th St. NY 10016 686-0920 RICHENTHAL, ADAMS & MOSS Attys for Addl. Defts on Counterclaim. 122 E. 42nd St. NYC, NY 10016 Kantor Shaw & Davidoff 200 Park Ave. N.Y.C. 10017 MU 2-8383 (Newburger Loeb & Co et al) Shaw & Stediaa (Slaone and Muh 350 Madison Av. 10017 682-2233 GOLD FARRELL & MARKS (deft Kayne) 595 Madison Ave N.Y. 10022 935-9200

STATISTICAL RECORD	COSTS
J.S. 5 mailed X	Clerk
J.S. 6 mailed 9-1-75 Settlement	Marshal
Basis of Action: VIOL. S.E.C. ACT. 1934 $299,000	Docket fee
	Witness fees
Action arose at: A	Depositions

DATE	NAME OR RECEIPT NO.	REC.	DI
2-17-71	Paid 1/	15	
2-19-71	C STEARNS		15

71 CIV. 685

DATE	PROCEEDINGS	Date Order Judgment N.
Feb17-71	Filed Complaint. Issued Summons.	
Mar.10-71	Filed stipulation and order extending defendants time to answer complaint to 4/15/71. So ordered. Bonsal, J.	
Mar 22,71	Filed summons with marshal's ret. Served Charles Gross by personally on 3-10-71 Served Gross & Co. by Charles Gross on 3-10-71	
Apr.19-71	Filed stipulation and order extending defendants time to answer complaint to 4/30/71. So ordered. Metzner, J.	
May 3-71	Filed ANSWER of defts Gross & Co., Charles H. Gross, Mabel Bleich, and Jeanne Donoghue, and counterclaims.	GW&M
May 6-71	Filed defts notice to take deposition of David Buckley, a witness.	
May 6-71	Filed defts notice to take deposition of Robert Persky a witness.	
May 20-71	Filed Notice of adjournment of deposition to 5/26/71.	
May 20-71	Filed Notice to take Deposition of Robert Persky.	
May 20-71	Filed Notice to take Deposition of David Buckley.	
Jul 13-71	Filed Supplemental summons with marshal's ret. Served:	
	Newburger, Loeb & Co. on 5/14/71.	
	Andrew M. Newburger on 5/7/71	
	Robert L. Newburger on 5/7/71	
	Leo Stern by Mr. B. Berkowitz on 5/7/71.	
	Robert L. Stern by B. Berkowitz on 5/7/71	
	Richard D. Stern by " " on 5/7/71	
	John F. Settel on 5/7/71	
	Harold J. Richards UNABLE TO SERVE.	
	Sanford Roggenburg on 5/5/71	
	Adolphus Roggenburg on 5/5/71	
	Ned D. Frank on 5/10/71	
	Alex Aixala by his sister Annie on 5/6/71.	
	Fred Kayne on 5/20/71	
	Robert Kuh on 5/5/71	
	Paul Risher by Mr. Berkowitz, V.P. on 5/7/71	
	Charles Sloane on 5/11/71	
Feb 24/72	Filed Notice to take deposition of H. Paul Burak. Issued Summons.	
Feb.28-72	Filed Amended ANSWER of defts. Gross & Co., Charles H. Gross, Mabel Bleich and Jeanne Donoghue, and counterclaims.	GW&M
Mar 17.72	Filed Memo end. on unsigned Order to show cause. After conference with the attys this motion is granted to the extent of extending the time to file a reply or move with respect to the answer to 4/19/72. No futher adjournments of this date to be entertained. So Ordered Metzner J.	
MAR 28-72	Filed summons with marshal's return. Served Robert S. Persky c/o Finley, Kumble, Underberg, Persky, & Roth, by William Jarblum on 3/1/72. Served: Lawrence J. Berkowitz c/O Newburger, Loeb & Co. Inc. by Marsha Levine on 3/3/72.	
Mar 7.72	Filed Deft's Notice of motion, Re: Compel Examination ret. 4/13/72.	
Apr 13-72	Filed in court, Affdvt of Bernard Rothman PE: Rule 9	
Apr 13-72	Filed in court Affdvt of David Abrams in opposition	
Apr 14-72	Filed memo endorsed on motion filed 4-7-72- Motion granted in accordance with the Courts ruling following argument-submit order- MOTLEY, J.	
Apr.20-72	Filed pltff's & additional deft's affidavit & notice of motion dismiss, counterclaim ret. 5-9-72.	
Apr.20-72	Filed pltff's & additional deft's joint memorandum in support of their motion ret. 5-9-72.	
Apr.21-72	Filed notice of motion re: Dismiss. ret. 5/9/72. (by defts. Persky and Finley, Kumble, Underberg, Persky & Roth).	

continued next page

B

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
Apr.26-72	Filed ORDER that Andrew M. Newburger is directed to appear at the offices of Golden,Wienshienk & Mandel for deposition and produce as indicated. Motley, J.(mailed notice).
May 4-72	Filed Order substituting Hart & Hume as attorneys of record for Robert S.Persky and the firm of Finley,Kumble,Underberg,Persky & Roth . Lasker,J.(mailed notice).
May 8-72	Filed stipulation adjourning motion now ret. 5/9/72 to 5/30/72.
May 5-72	Filed Notice of Motion re: Dismiss Counterclaim. Ret. 5/30/72. (for certain additional defendants). together with affidavit in support.
May 16-72	Filed stip & order that deposition of Andrew Newburger presently set for 5-25-7 is adj. to 10AM on 6-8-72-So ordered-Frankel,J
May 26-72	Filed stipulation adjourning motion now ret. 5/30/72 to 6/6/72.
MAY 30-72	Filed Deposition of Leo Stern. m/n
" " "	Filed Cont'd Deposition, of Leo Stern.
MAY 30-72	Filed Deposition of additional defendant Robert Muh - m/n
" " "	Filed Cont'd Deposition of defendant Robert Muh.
MAY 30-72	Filed Deposition of plaintiff Newburger,Loeb & Co. Inc. -m/n
MAY 30-72	Filed Deposition of witness H. Paul Burak m/n
MAY 30-72	Filed Deposition of David Buckley- m/n
MAY 30-72	Filed Deposition of Robert S. Persky. m/n
Jun 1-72	Filed Affidavit in opposition to stay proceedings on the ground of arbitration.
Jun 1-72	Filed Defendants' Memorandum of Law in opposition to motions of pltf. and counterclaim defendants todismiss.
Jun 1-72	Filed Notice of Motion re: Summary Judgment. Ret. 6/6/72. (by defendants)
Jun 1-72	Filed Defts'.Memorandum of Law in support of motion for summary judgment.
Jun 6-72	Filed stipulation adjourning motion now ret. 6/6/72 to 7/25/72.
Jun 6-72	Filed stipulation adjourning motion now ret. 6/6/72 to 7/25/72.
Jun 6-72	Filed stipulation adjourning motion now ret. 6/6/72 to 7/25/72.
Jun.8-72	Filed Consent to Change Attorney, that Richenthal,Abrams and Moss be substituted for deft. Newburger,Loeb & Co., et al. So Ordered; Cannella,J.
Jun 22-72	Filed Interrogatories to Robert L. Stern.
Jun 22-72	Filed Notice to take Depositionof Paul Risher.
Jun 22-72	Filed Interrogatories to Robert S. Persky.
Jun 22-72	Filed Notice to take Deposition of Robert L. Stern.
Jul 13-72	Filed Defts notice of motion for summary juedgment (ALEX AIZALA)ret 7-25-72.
Jul 24-72	Filed stip by all parties that motion rtble 7-25-72 are adjourned to August 29-72.
Aug.28-72	Filed Affidavit in opposition to The Gross Defendants motion for summary judgment.
Aug.28-72	Filed Joint Reply Memorandum submitted on behalf of pltf. and additional defendant in support of motions to dismiss counterclaims.
Aug.28-72	Filed Joint Answering Memorandum submitted on behalf of pltf. and additional defen in answer to The Gross Defendants motion for summary judgment.
Oct.5,1972	Filed Answer of Robert L. Stern(an Add'l Deft on Counterclaim) to Deft's Interrog.
Oct.5,1972	Filed Answer of Robert Persky(an addl deft on counterclaim)to Deft's "
xxxxx72	xxxx

DATE	PROCEEDINGS	Date Order or Judgment Noted
ct.16-73	Filed memo endorsed on motion filed 4-20-72 to dismiss-Motion granted in part and denied in part in accordance with opinion filed herewith--Ward, J.	
ct.16-73	Filed memo endorsed on motion filed 4-24-72 to dismiss-Motion granted in kpart and denied in part in accordance with opinion filed herewith--Ward, J.	
ct.16-73	Filed memo endorsed on motion filed 5-5-72 to dismiss-Motion granted in part and denied in part in accordance with opinion filed herewith--Ward, J.	
ct.16-73	Filed memo endorsed on motion filed 6-1-72 to dismiss-Motion granted in part and denied in part in accordance with opinion filed herewith--Ward, J.	
ct.16-73	Filed memo endorsed on motion filed 7-13-72 to dismiss-Motion granted in part and denied in part in accordance with opinion filed herewith--Ward, J.	
ct.16-73	Filed reply affdvt of D.Abrams in support of motion to stay.	
ct.16-73	Filed affdvt of service by an individual.	
ct.16-73	Filed defts' memorandum in opposition to motion for a stay.	
ct.16-73	Filed defts' reply memorandum in support of motion for summary judgment.	
ct.16-73	Filed transcript of record of proceedings of Sep.22,1972.	
ct.16-73	Filed transcript of record of proceedings of Jan.9,1973	
ct.16-73	Filed OPINION #39,925--Pltff's and addt'l defts. motion to dismiss the counterclaims is denied. Addt'l defts. motion for a stay pending Arbitration is denied. Addt'l deft. Alex Aixala's motion for summary judgment is denied. Defts. motion for summary judgment is granted in part. Summary judgment dismissing pltff's 3rd cause of action and that portion of the fourth cause of action which relates to transaction between April,1962 and Sept. 1, 1963 is granted. Settle order on notice---Ward, J.	
ct.23-73	Filed memo endorsed on motion filed 10-15-73--Motion granted. No opposition-Settle order on notice--Ward, J.	
ov.2.73	Filed Defts. Memorandum on motion for reargument of Opinion dated 10/16/73.	
ov.2.73	Filed Defts. Notice of Motion. Re Reargument. ret. 11/13/73.	
ov.7.73	Filed Pltffs. Notice of Motion.Re: Reargument. ret.11/13/73.	
v.7.73	Filed Pltff. & Additional Defts. on counterclaims Memorandum on motion for reargument of Opinion dated 10/16/73.	
ov. 12/73	Filed Joint Answering memorandum submitted on behalf of pltff. & additional defts. in answer to the gross defts. motion for reargument.	
ov.26.73	Filed Memo. End. on motion dated 11/7/73.Motion denied in accordance with memorandum decision filed herewith. Ward. (mailed notice)	
ov.26.73	Filed Memo. End. on motion dated 11/2/73.Motion granted in part & denied in part in accordance with memorandum decision filed herewith. Ward J. (mailed notice)	
v.26.73	Filed Memorandum decisionOrdered that the motions for reargument are granted & the previous opinion of this court is clarified & corrected as indicated. In all other respects the motion & cross motion for reargument are denied. SETTLE ORDER ON NOTICE. Ward J. (mailed notice)	
c.5.73	Filed Pltff. Notice of deposition of Mabel Bleich on 12/10/73,Jeanne Donoghue 12/12/73, Charles Gross on 12/14/73.	
c. 7-73	Filed order-All motion of pltff. & all addt'l defts. on counterclaims are denied except as indicated. ---Ward, J. mailed notices.	
-6-73	PRE-TRIAL CONFERENCE HELD BY Mag. Gagliardi	
12-13	PRE-TRIAL CONFERENCE HELD BY Mag. Gagliardi	
26 73	PRE-TRIAL CONFERENCE HELD BY Mag. Gagliardi	
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FPI—LK -12-3-63—12M—2045

---Cont'd Page #5---

DATE	PROCEEDINGS
Jan. 29-74	Filed Pltff's reply & Addtl Defts. ANSWER to AMENDED ANSWER & COUNTERCLAIMS of Defts. FHUeG
Feb 27.74	Filed Reply brief in support of Jeanne Donoghue's motion to dismiss the 5th defense set forth in the reply or alternatively for an order of interv. pleas.
4/24/74	PRE-TRIAL CONFERENCE HELD BY Goettel
[illegible]	[illegible] Memorandum & Order ...ever Accordingly, the motion is granted, intervention is allowed & the various pleading by both pltff. & the additional defts. on counterclaims extending her standing are stricken. Owen J. (mailed notice)
Mar 27 74	Pre trial conf held Mag Goettel
Apr 17 74	" " " " " Goettel
Apr. 1974	" " " " " Goettel.
Apr. 29-74	Filed pltff's interrogs.
May 2-74	Filed pltff's affdvt & notice of motion to withdraw as atty-Ret. 5-10-74.
May 13.74	Filed Defts on Counterclaims, Robert S. Persky, et al, Objections to Deft's request for Documents.
May 20-74	Filed transcript of record of proceedings of April 1, 1974.
May 20-74	Filed pltff. & addt'l defts. memorandum of law.
May 20-74	Filed deft's memorandum of law.
May 20-74	Filed defts' reply brief with regard to atty-client privilege.
May 20-74	Filed Memorandum Opinion #40,721-(On objections asserted on depositions by two witnesses.) The witnesses are directed to answer the questions.-So Ordered Goettel, Magistrate Judge. Mailed notices.
May 23-74	Filed answers of additional deft, on counterclaims to 1st set interrogs.(Berkowitz)
Jun 4-74	Filed memo endorsed on motion filed 5-2-74--Motion granted. Pltff. within 30 days pay fees of Finley, Kumble. I place the action on lthe Court's calendar for a status report on June 28, 1974 at 11:45 a. m. Pending the retention & preparation of successor counsel, all uncompleted discovery herein is stayed. So Ordered Owens, J. Mailed notices
Jun 24.74	Filed Deft. Gross Bleich & Donoghue Notice of Motion with supporting affidavit . Re:Enter appearance on behalf of the Estates of Leo Stern & Ned D.Frank & that Richenthal Abrams & Moss pay the expenses of this motin etc. ret.6/28/74.
Jun 24.74	Filed Deft. Gross Bleich & Donoghue Notice of Motion with supporting affidavit. Re:Compell answers to Interrogs. ret. 6/28/74.
6/28/74	Pre-Trial Held Owen J.
Jul 15.74	Filed Notice of Appearance for Estate of Leo Stern.
Jul 15.74	Filed Notice of Appearance for the Estate of Ned D. Frank.
7-25-74	Filed transcript of record of proceedings, dated 3/1/74.
Aug 23.74	Filed memo. end. on motion dtd. 6/24/74. Motion referred to Magistrate Hartenstein. as indicated. Owen J. /Newburger Loeb & Co,
Sep. 24-74	Filed pltff & addt'l defts //Risher & Rixala notice of appearance.
Oct 17.74	Filed Endorsement on copy of Memorandum & Order dtd. 8/30/74. Defts. Motion for an order compelling answer to interrogs Ordered pltffs answer the interrogs. within 10 days. So Ordered Owen J.
11-1-74	PRE-TRIAL CONFERENCE HELD BY Goettel
Nov 6.74	Filed Defts. Notice of Motion for Default Judgment, etc. with support affidavit ret. 11/15/74.
Nov 13.74	Filed Affidavit in opposition to motion of defts. Charles Gross,et al. for order of default with regard to counterclaims.
Nov 13.74	Filed Notice of Appearance for Addtl. Defts.Fred Kayne,Robert Muh,Lawrence J. Berkowitz & Charles Sloane. SDNT

DATE	PROCEEDINGS
11-9-74	Filed transcript of record of proceedings, dated 5-20-74
Nov. 22-74	Filed OPINION # 41,475---Motion by defts. for an order fixing sanctions against addt'l defts. on counterclaims Andrew M. Newberger et al is granted. The reply of the above named addt'l defts. on counterclaims is stricken, however execution of this order is stayed for 10 days. If the addt'l defts. serve full & complete answers to interrogs. this order shall be null & void. Defts. further move for an order adjudging Fred Kayne et al to be in default. Motion denied. on condition that the sum of $250 be immediately paid to Mr. Mandel by addt'l Kayne, Muh, Berkowitz & Sloane, within 10 days. -So Ordered-Owen, J. Mailed notices.
Nov. 22-74	Filed affdvt of D.Abrams in opposition to motion for sanctions.
Dec. 5-74	Filed stip & order-the Opinion & Order entered 11-21-74 is modified. The name of Newburger, Loeb & Co an addt'l deft. on counterclaims shall be deemed stricken and deleted from the 1st paragraph of said Order. No sanction shall be applied against said addt'l deft. under said Order. Time of addt'l defts. on counterclaims Robert Stern & Richard Stern to answer interrogs. is extended to 12-6-74, & if said addt'l defts. shall serve complete answers to interrogs. by not later than said date, their replies to counterclaims shall not be stricken. --Owen, J.
Dec. 12-74	Filed memo endorsed on unsigned Order to Show Cause submitted.-This proposed order is withdrawn--Owen, J.
12-12-74	PRE-TRIAL CONFERENCE HELD BY Goettel
Dec. 18-74	Filed Magistrate Goettel Report and Recommendation.
12-20-74	PRE-TRIAL CONFERENCE HELD BY Goettel
an 6-75	Filed defts' Charles Cross, Mabel Bleich, Jeanne Donohue & Gross & Co. affdvt & notice of motion for an order to file a Second Amended Answer, etc. Ret. 1-10-75 at 2:15 P.M.
Jan 6-75	Filed defts' brief in support of the motion for leave to Amend the Answer.
Jan. 8-75	Filed pltff's affdvt & notice of motion for an injunction-Ret. 1-17-75.
Jan. 8-75	Filed pltff's memorandum of law.
Jan. 15-75	Filed affdvt of defts'(Persky & Finley Kumble etc) in opposition to motion for leave to amend.
Jan. 16-75	Filed affdvt of some of the addt'l defts. in support of stay.
Jan. 16-75	Filed defts' brief in opposition to stay.
Jan. 16-75	Filed defts' supplemental memorandum in opposition to motion for a stay.
Jan. 23-75	Filed defts'(Gross Bleich & Donoghue) affdvt in response to papers submitted by Mr. Shaw on his motion for a stay.
Feb 4.75	Filed Memo. End. on motion dtd. 1/8/75. Motion is denied without prejudice to its renewal before the Bankruptcy Court in accordance with Part VII of the Bankruptcy rules 411 U.S. 1185. So Ordered Owens J. (mailed notice)
Feb. 18-75	Filed defts'(Gross,et al) affdvt in reply to affdvts. of Meyer and Roth submitted in opposition to defts' motion for leave to amend.
Feb. 18-75	Filed defts'(Gross et al) brief in answer to the brief of proposed new addt'l counterclaim defts. with regard to motion for leave to amend.
eb. 14-75	Filed answers of addt'l deft. on counterclaims Robt. Muh to interrogs.
Feb. 24-75	Filed pltff's supplemental memorandum.
Feb. 24-75	Filed pltff's reply affdvt to defts' opposition to pltff's motion.
Feb. 24-75	Filed addt'l defts' affdvt in support of stay.
Feb. 24-75	Filed addt'l defts. affdvt in support of stay.
r. 7-75	Filed addt'l defts. on counterclaim answers' to interrogs.
pr. 7-75	Filed pltff's & addt'l defts. interrogs.
Apr. 14-75	Filed memo endorsed on motion filed 1-6-75(leave to amend answer)-Counterclaiming defts' motion to add parties is denied. Parties are directed to be ready for trial on June 2, 1975. Magistrate Goettel shall be available to the parties to supervise discovery. So Ordered--Owen, J. Mailed notices.

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D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
Apr 18-75	FiledDefts. Brief in answer to the Brief of Proposed New Additional Counterclaim defts. with regard to motion for leave to amend the answer & to bring in new parties.
4-26-75	PRE-TRIAL CONFERENCE HELD BY Settle
May 5-75	Filed deft's 2nd interrogs. to addt'l deft. on counterclaims Robert S. Persky.
May 5-75	Filed deft's interrogs. to addt'l deft. Partnership, Finley, Kumble,Underberg, Persky & Roth.
May 5-75	Filed deft's interrogs. to Lawrence J. Berkowitz.
May 5-75	Filed deft's interrogs. to Fred Kayne.
May 5-75	Filed deft's interrogs. to Robert Muh.
May 5-75	Filed deft's interrogs. to Andrew M. Newburger.
May 5-75	Filed deft's interrogs. to Robert L. Newburger.
May 5-75	Filed deft's interrogs. to Harold J. Richards.
May 5-75	Filed deft's interrogs. to Paul Risher.
May 5-75	Filed deft's interrogs. to Sanford Roggenburg.
May 5-75	Filed deft's interrogs. to John F. Settle.
May 5-75	Filed deft's interrogs. to Charles Sloane.
May 5-75	Filed deft's interrogs. to Richard D. Stern.
May 5-75	Filed deft's interrogs. to Robert L. Stern.
May 5-75	Filed deposition of Andrew M. Newburger. Mailed notices.
May 5-75	Filed deposition of Fred Kayne. " "
May 5-75	Filed cont'd deposition of Fred Kayne.
May 5-75	Filed cont'd deposition of Fred Kayne.
May 5-75	Filed deposition of Robert L. Stern. " "
May 5-75	Filed deposition of Charles Sloan. (dtd. 2-1-74) " "
May 5-75	Filed deposition of Charles Sloan. (dtd. 1-28-74)
May 5-75	Filed cont'd deposition of Robert S. Persky. " "
May 5-75	Filed cont'd deposition of Robert S. Persky.
May 5-75	Filed cont'd deposition of H.Paul Burak. " "
May 7-75	Filed defts' (Gross, Bleich & Donoghue) affdvt & Order to Show Cause Re: depositions of addt'l defts. be used. Pending hearing of this motion said addt'l defts. on counterclaims & their attys are enjoined from marking & in any way changing such depositions--Owen, J.--Ret. 5-9-75.
May 12-75	Filed defts' (Finley et al) affdvt in opposition to motion by defts. for an order directing the return of transcripts.
May 12-75	Filed memo endorsed on Order to Show Cause filed 5-7-75 Re: deposition--Motion is decided in accordance with the minutes of May 9, 1975. So Ordered-Owen,J. Mailed notices.
May 27-75	Filed objections by addt'l deft. on counterclaim to interrogs.
May 27-75	Filed objections by addt'l deft. on counterclaim to interrogs. 2nd set.
June 2-75	Filed affdvt of Joan Ruth Kutner of personal service.
June 4-75	Filed supplementary memorandum of law of addt'l defts. on counterclaims.
June 9-75	Filed order (Re: defts' respond to interrogs) Defts. are to comply with the directio in this order no later than 6-6-75 except as to interrog. #14, and with respect to said interrogs. defts. are to respond no later than 6-11-75. Pltff's objections to answer to other interrogs. are overruled.--Owen, J.--Mailed notices.
6-3-75	PRE-TRIAL CONFERENCE HELD BY Settle
June12-75	Filed Schaeffer Dale & Vogel affdvt & notice of motion to withdraw as attys for Lawrence Berkowitz-Ret. 6-13-75.
Jun 13.75	Filed Memo. Endn on motion dtd.6/12/75. Order granted the firm of Schaeffer Dale & Vogel leave to withdraw as atty. for deft. Lawrence Berkowitz. Owen J.
Jun17-75	Filed Consent Order substituting Attorneys , ordered that the Firms of Martin F. Silfen, P. C. and Bondy & Schloss be substituted as attys of record for additional defts F. Kayne, C. Sloane and R. Muh in the above action in place and stead of the law firm of Schaeffer, Dale, Vogel & Tavros, Owen, J.

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NEUBERGER LOEB & CO. INC. ETC. VS C. GROSS ET-AL PG 0

71 Civ 685

DATE	PROCEEDINGS	Date Ord Judgment
Jun16-75	Filed Deposition of Paul Resher, dated 5-15-74.	
Jun16-75	Filed depostiion of Michael A. Bamberger, date d 5-17-74.	
Jun16-75	Filed deposition of pltff New burger, Loob & Co. Inc. by Harold J. Richards, dated, 2-13-74.	
Jun16-75	Filed deposition of additional deft. Sanford Roggenburg, dated 1-23-74.	
Jun16-75	Filed deposition of deft. Paul D. Risher, dated 7-10-72.	
Jun16-75	Filed deposition of deft. Paul D. Risher, dated 7-18-72.	
Jun16-75	Filed defts supplemental answers to second set of interrogatories of pltff and of additional defts Risher and Aixala.	
Jun16-75	Filed ANSWER of additional deft on Counterclaims, Robert S. Persky to second interrogatories dtd. 4-24-75.	
Jun16-75	Filed Pltffs Notice under Rule 26/ 4 / (1) FRCP.	
Jun16-75	Filed defts second supplemental answer to second set of interrogatories of pltff and of additional defts Risher and Aixala.	
Jun16-75	Filed Notice To Produce by defts Gross, Bleich and Donoghue	
Jun16-75	Filed defts answers to interrogatories.	
Jun16-75	Filed defts Answers to further interrogatories of pltff and additional defts Risher and Aixala.	
Jun9-75	Filed Notice of Appearance that Lawrence J. Berkowitz deft. appears in pro se. etc. as indicated.	
June 25-75	Filed defts' Gross, Bleich and Donoghue affidavit in opposition to the motion of additional defts' on counterclaims Kayne, Muh and Sloane for an order to dismiss first counterclaim and the fifth and ninth counterclaims	
3-20-75	*Filed Transcript of record of proceedings, dated* JUNE 16, 1975	
3-20-75	*Filed Transcript of record of proceedings, dated* JUNE 25, 1975	
3-20-75	*Filed Transcript of record of proceedings, dated* JUNE 30, 1975	
9-23-75	Filed transcript of record of proceedings, dated July 1, 10, 16, 21, 22, 31, 1975	
10-10-75	Filed Judgment, Ordered that the counterclaims against Alex Aixala be dismissed with prejudice and that said deft recover his costs herein, Owen, J. Judgment entered 10-14-75. Clerk. ITN	
10-16-75	Filed pltff and deft on counterclaim Risher's post trial memorandum of law.	
10-15-75	Filed Answering memorandum of law in oppostion to the motion of Jeanne Donoghue, etc, as indicated.	
10-15-75	Filed supplementary memorandum in support the motion to strke from the answer of additional defts. etc, as indicated.	
10-15-75,	Filed transcript of record of proceedings, dated 4-1-74.	
10-15-75	Filed defts memorandum of law in opposition to motion of Finley, Kumble, Heine etc, as indic ated.	
10-15-75	Filed memo of law in response to the motion of Kayne, Slaoane and Muh for an order dismissing the first counterclaim, etc, as indicated.	
10-15-75	Filed Brief of proposed additional counterdlaim defts, as indicted.	
10-15-75	Fileed Pltffs memorandum regarding admissibility of testimony that shortly prior to suspension of Trading in Westec Stock, Buckley advised Gross & Co to sell , but Was fraudently importuned not to.	
10-15-75	Filed Affidavit of Phili P Mandel dated 6-12-75.	
10-15-75	Filed Pltff amended complaint.	
10-15-75	Filed supplemental memorandum of Finley, Kumble, etc, concerning dererminationof Ward, J. that the transfer agreement violated 93 of the Partnership Law.	
10-15-75	Filed memorandum of Finley, Kumble etc. concerning the impropriety of advising the jury, etc, as indicated.	
10-15-75	Filed Affidavit of Lawrence J. Berkowitz, etc, as indicated dated 6-25-75.	
10-15-75	Filed memorandum of law relating to the examination of Robert S. Persky.	
10-15-75	Filed Trial Brief of additional deft, Finley, Kumble, Heine, Underberg & Gruiman.	
10-15-75	Filed memorandum of Finley, Kumble, Heine, etc, concerning the impropriety of advising the jury at this stage of the case, etc, as indicated.	

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D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
10-15-75	Filed Affidavit of Lester Esterman, dated 6-20-75.
10-15-75	Filed Affidavit of Arthur C. Silverman, dated 4-1-74
10-15-75	Filed Affid vit of Arthur C. Silverman, dated 2-28-74.
10-15-75	Filed Transcript of Record of Proceedings dated March, 1974.
10-15-75	Filed Affidavit of Herbert F/ Roth, dated 4-1-74.
10-15-75	Filed Pltffs Affidavit & Notice of Motion for an orde permitting the undersigned draw as attys and counsel in this laws uit for pltff Newburger, Loeb & Co. Inc., e rtble before Owen, J. on 5-10-75.
10-23-75	Filed Pltffs Notice of Entry.
11-3-75	Filed defts Gross, Bleich, and Donoghue, Affidavit & Order To Show Case, why an order should not be made herein striking in whole or part the post trial brief of additional deft Finley, Kumble, Heine, Underberg & Grutmean aetc, as indicated rtbl before Owen, J. on 11-7-75. Owen, J.
11-7-75	Filed Clerks Copy (Court Reporters) as indicated.
11-10-75	Filed memo endorswd on motion filed (Order To Show Cause) on 11-3-75: The motion is granted to the extent that Finley Kumble is directed to file anew memorandum etc, as indicated. Owen, J. M/N
11-11-75	Filed pltffs affidavit for additional deft on counterclaim in opposition to a motio by defts to strike all or a portion of the Post Trial Memoorandum, etc, as indicated.
12-19-75	Filed transcript of record of proceedings dated 7-22-75.
03-12-76	**Filed transcript of record of proceedings dated 6-16-75.**
07-22-76	Filed Opinion #44722 - I find in favor of Deft. Gross and against Pltff. and each of the additional Defts. on counterclaims (except Berkowitz) on the first, second and fourth counterclaims in the sum of $337,921.00 plus interest since 2-11-71, and in favor of Deft. Gross against each of the new team (except Berkowitz) and Persky and Finley Kumble in the sum of $134,171.75. Further, I find in favor of Deft. Gross and against the new team (except Berkowitz) and Persky and Finley Kumble in the sum of $50,000 as punitive damages. I further find in favor of each of the Defts. Donoghue & Bleich against Pltff. and each additional Deft. on counterclaim (except Berkowitz) in the sum of $76,868.75 together with interest thereon from 12-21-70. All remaining claims of all parties are hereby dismissed. Submit judgment on ten days' notice.....Owen,J. (mailed notice)
07-22-76	**Filed Memo of Defts.(C. Gross, M. Bleich, JDonoghue) Re Settlement of Judgment.**
09-01-76	Filed Add'l. Defts'. (Kayne, Sloane & Muh) affidavit & notice of mtion to dismiss the counterclaims & for summary judgment, ret. 6-6-75.
09-01-76	Filed Add'l. Defts'. (Kayne, Sloane & Muh) post-trial memorandum of law.
09-01-76	Filed Defts', post-trial brief.
09-01-76	Filed Pltff's, post trial memorandum of law.
09-01-76	Filed Pltff's, post trial memorandum of law (revised version).
09-01-76	Filed Judgment #76,805 - that Pltff's. complaint & 6 counterclaims are dismissed on the merits. That Deft. (C. Gross) recover the following sums on the first, second & fourth counterclaims: From the Pltff. & all Add'l. Defts. (except Berkowitz) the sum of $337,921.00 plus interest. From Finley Kumble, Persky Kayne, Muh, Risher, Sloane & Newburger, Loeb & Co., Inc. the sum of $58,368.75, plus interest, the sum of $75,803.00, plus interest plus the sum of $50,000.00 as punitive damages. That Deft. (Bleich) recover on the first, second & fourth counterclaims from the Pltff. & all Add'l Defts. (except Berkowitz) the sum of $76,868.75 plus interest. That Deft. (Donoghue) recover on the first, second & fourth counterclaims from the Pltff. & all Add'l. Defts. (except Berkowitz) the sum of $76,868.75 plus interest. Defts. first second & fourth counterclaims are dismissed as to Berkowitz. Defts'. 3rd, 5th, 6th, 7th & 8th counterclaims are dismissed for lack of jurisdiction. The 9th counterclaim is dismissed on the merits. Defts. shall recover the cost of this action from the Pltff. & all Add'l. Defts. (except Berkowitz).....Owen,J. Judgment Entered 9-1-76. .....Clerk. Entered 9-2-76. (mailed notice)

NEUBURGER, LOEB & CO., INC., etc. -v- CHARLES GROSS, et al,

71 Civ. 685

Owen, J.

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DATE	PROCEEDINGS	Date Order or Judgment Noted
* 06-16-75	Before Owen, J. jury trial begun.	
06-17-75	Trial continued.	
06-18-75	Trial continued.	
06-19-75	Trial continued.	
06-20-75	Trial Continued.	
06-23-75	Trial continued.	
06-24-75	Trial continued.	
06-25-75	Trial continued.	
06-26-75	Trial continued.	
06-27-75	Trial continued.	
06-30-75	Trial continued.	
07-01-75	Trial continued.	
07-02-75	Trial continued.	
07-03-75	Trial continued.	
07-07-75	Trial continued.	
07-08-75	Trial continued.	
07-09-75	Trial continued.	
07-10-75	Trial continued.	
07-11-75	Trial continued.	
07-14-75	Trial continued.	
07-15-75	Trial continued.	
07-16-75	Trial continued.	
07-17-75	Trial continued.	
07-18-75	Trial continued. Jury waived. Trial continues non-jury.	
07-21-75	Trial continued.	
07-22-75	Trial continued.	
07-23-75	Trial continued.	
07-24-75	Trial continued.	
07-28-75	Trial continued.	
07-29-75	Trial continued.	
07-30-75	Trial continued.	
07-31-75	Trial continued.	
08-01-75	Trial continued & concluded. All motions by all parties, 60 days for briefs to be exchanged. Decision Reserved.	
09-13-76	Filed supersedeas bond on appeal in the sum of $984,453.25 - Insurance Company of North America.	
09-22-76	Filed Add'l. Deft's. (Robert S. Persky) notice of appeal from the final judgment entered on 9-1-76. (mailed notice)	
09-27-76	Filed notice of appeal to the USCA by Deft. Kayne from the final judgment of 9-1-76 (m/n)	
09-29-76	Filed ntice of appeal to the USCA of Deft Charles Sloane from the final judgment of j. Owen dated 9-1-76.	
09-29-76	Filed notice of appeal to the USCA for the final judgment of J. Owen dated 9-1-76 by Robert Muh.	
09-29-76	Filed notice of appeal to USCA of additional Defts from the final Order of J. Owen dated 9-1-76 (m/n)	
09-30-76	Filed notice of appeal to the USCA fo pltff and additional deft Risher from the final judgment of 9-1-76. (m/n)	
09-30-76	Filed notice of appeal to the USCA of Finley Kumble etc(additional deft.) from the final judgment of Sept. 1, 1976	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

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DATE	PROCEEDINGS
10--4-76	Filed order of substitution of attorneys for Shaw Stedina 350 Madison Ave. Owen J.
10-5-76	Filed notice of appeal to the USCA form the judgment of Sept 1, 1976 by defts Gross, Bleich and Donoghue.(m/n)
10- 07-76	Filed notice of appearance of Mssrs Gold, Farrell & Marks as co-counsel to Martin Silfen for additional deft F. Kayne.
11-8-76	Filed transcript record of proceedings dtd: June16,20,1975.
11-8-76	" " " " " June 23,26,1975
11-8-76	" " " " " June 27,30 and July 1/75.
11-8-76	" " " " " July 7,10,1975
11-8-76	" " " " " July 11,14,15,16/75
11-8-76	" " " " " July 17,18,21 22,/75
11-8-76	" " " " " July 23,24,28,29 /75
11-8-76	" " " " " July 30,31, &Aug 1/75
11-18-76	Filed memo and order... The names of Robert Muh and Charles Sloane should not appear on the judgment of 9-1-76. Owen J.
12-21-76	Filed copies of bill of costs - A Rosenthal Atty for Plaintiffs
1-7-77	Filed notice of transmission of record to USCA.

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-SUMMONS AND COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 CIV. 685

NEUBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants.

PLAINTIFF DEMANDS TRIAL BY JURY

SUMMONS

U.S. DISTRICT COURT FILED MAR 22 1971 S.D. OF N.Y.

1971 FEB 17 PM 4:43 RECEIVED

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to serve upon FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, ESQS., plaintiff's attorneys, whose address is 477 Madison Avenue, New York, New York 10022 an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON
Clerk of the Court

Deputy Clerk

Dated: New York, New York
February 16, 1971

[Seal of Court]

3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEUBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants.

----------X

COMPLAINT

U.S. DISTRICT COURT
FILED
FEB 17 1971
Index No.
S. D. OF N.

Plaintiff, complaining of defendants by its undersigned attorneys, Messrs. FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, alleges:

JURISDICTION

1. This Court's jurisdiction is based upon: Section 22(a) of the Securities Act of 1933, as amended, 15 U.S.C. §77v(a) (the "Securities Act"); Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa (the "Exchange Act"); and the principles of pendent jurisdiction.

2. This action is instituted as the result of defendants' violation of Section 17(a) of the Securities Act; Sections 10(b) and 15(c) of the Exchange Act; the Rules and Regulations of the Securities Exchange Commission (the "SEC") promulgated under both Acts and in particular: Rule 10b-5, 17 C.F.R. 240.10b-5; Rule 15c1-7, 17 C.F.R.

240.15c1-7; the Rules of the National Association of Security Dealers (the "NASD"); and common law principles.

PLAINTIFF

3. Plaintiff Neuburger, Loeb & Co., Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 5 Hanover Square, New York, New York.

4. On or about December 30th, 1970, for good and sufficient consideration, David Buckley and his wife Mary Buckley (the "Buckleys"), then residing at 82 West River Road, Rumson, New Jersey, assigned to Neuburger, Loeb & Co., a New York limited partnership, all of the claims and causes of action against the defendants herein.

5. On or about February 11, 1971, for good and sufficient consideration, Neuburger, Loeb & Co. assigned to the plaintiff, Neuburger, Loeb & Co., Inc. all of the claims and causes of action against the defendants herein, which were assigned to it by the Buckleys.

DEFENDANTS

6. Defendant Charles Gross is an individual residing at 32 The Intervale, Roslyn Heights, New York. During all relevant times upon information and belief, he was a partner, agent and employee of defendant Gross & Co.

7. Defendant Mabel Bleich is an individual residing at 1020 Grand Concourse, Bronx, New York. During all relevant times, upon information and belief, she was a partner, agent and employee of defendant Gross & Co.

13. During that 4-1/2 year period, defendant Charles Gross suggested, encouraged and effected a total of more than 1,100 transactions in the margin account of the Buckleys.

14. Upon information and belief, all of the more than 1,100 transactions effected in the margin account of the Buckleys were made pursuant to the advice of defendant Charles Gross, the Buckleys relying not only upon the professed knowledge and expertise of defendant Charles Gross in the securities market, but also upon the fiduciary relationship of broker to customer.

15. The total dollar amount of purchases and sales during that 4-1/2 year period was $9,329,557. The average investment by the Buckleys' in the account during that same period was $107,520. Thus, the average investment of the Buckleys' in the account was turned over approximately 40 times.

16. The unusually excessive and, under the circumstances, totally unwarranted heavy trading was not consistent with and was in derogation of defendant's primary duty to advise and encourage sound investment decisions.

17. The unusually excessive and, under the circumstances, totally unwarranted heavy trading in the Buckleys' account was suggested, encouraged and effected primarily for the purpose of generating commissions, which, upon information and belief, were in excess of $75,000.

18. The unusually excessive and, under the circumstances, totally unwarranted heavy trading in the Buckleys' account resulted in net losses to the Buckleys exceeding $174,000.

19. The defendant Mabel Bleich as a partner of defendant Gross & Co., was under the obligation to properly review the actions of defendant Charles Gross as well as supervice the transactions in the Buckleys' account, which upon information and belief, defendant Mabel Bleich failed to do and for which she is jointly and severally liable.

FOR A SECOND CAUSE OF ACTION

20. This second cause of action is instituted under Section 27 of the Exchange Act, to enforce rights arising out of defendants' violation of Section 10 of the Exchange Act, and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.

21. Plaintiff repeats each and every allegation set forth in paragraphs "10' to "19" with the same force and effect as if the same were hereat fully set forth.

FOR A THIRD CAUSE OF ACTION

22. This third cause of action is instituted under Section 27 of the Exchange Act, to enforce rights arising out of defendants' violation of Section 15(c) of the Exchange Act and Rule 15c1-7 promulgated thereunder, 17 C.F.R. 240.15c1-7.

23. Plaintiff repeats each and every allegation set forth in paragraphs "10" to "18" with the same force and effect as if the same were hereat fully set forth.

FOR A FOURTH CAUSE OF ACTION

24 Plaintiff repeats each and every allegation set forth in paragraphs "10" to "19" with the same force and effect as if the same were hereat set forth in full.

25. Defendants have violated common law duties owed by them to the Buckleys.

FOR A FIFTH CAUSE OF ACTION

26. Plaintiffs repeat each and every allegation set forth in paragraphs "10" to "19" with the same force and effect as if the same were hereat set forth in full.

27. That by reason of the fraudulent conduct and deceit practiced and participated in by the defendants, the acts and practices engaged in by the defendants which constitute violations of the Securities Act, the Exchange Act, and the Rules and Regulations promulgated under both acts, plaintiff has been compelled to and has engaged counsel to prosecute this action against the defendants herein.

28. Plaintiff has been informed and verily believes that the services to be rendered by said counsel could be extensive and may be required over a long period of time,

and if not settled will require substantial cash disbursements in the prosecution of this action by reason of the complexity of the transactions in the account of the Buckleys, and will further require extensive examinations before trial and that the fair and reasonable value of the services to be rendered by said counsel in the investigation, preparation and trial of this action will be in excess of $50,000.

WHEREFORE, plaintiff NEWBURGER, LOEB & CO., as assignee of David Buckley and Mary Buckley, respectfully requests judgment as follows:

(a) on the FIRST, SECOND, THIRD and FOURTH CAUSES OF ACTION, money damages as against the defendants Charles Gross, Mabel Bleich and Gross & Co., in excess of $249,000., jointly and severally, or such other measure of recovery for defendants' violations, as the court may deem just and proper;

(b) on the FIFTH CAUSE OF ACTION, money damages as against the defendants, jointly and severally, in excess of $50,000 or such other sum as the court may find just and reasonable as and for plaintiff's counsel fees; and

(c) such other, further and different relief as may be deemed just and proper;

together with interest from the date of the violations or

wrongs hereinbefore set forth, with costs and disbursements.

Dated: New York, New York
February 16, 1971

FINLEY, KUMBLE, UNDERBERG,
PERSKY & ROTH

By: Herbert F. Roth
Herbert F. Roth
A Member of the Firm
Attorneys for Plaintiff
477 Madison Avenue
New York, New York 10022
212 371-5900

SUPPLEMENTAL SUMMONS,
ANSWERS & COUNTERCLAIMS

SUMMONS IN A CIVIL ACTION D. C. Form No. 45a Rev. (6-49)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

10

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH and GROSS & CO.

Defendants,

CIVIL ACTION FILE NO. 71 Index No. 685

SUPPLEMENTAL SUMMONS

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, and CHARLES SLOANE.

Additional Defendants on Counterclaims

To the above named Additional Defendants on Counterclaims:

You are hereby summoned and required to serve upon

GOLDEN, WIENSHIENK & MANDEL

defendants' attorneys, whose address is 10 East 40th Street, New York, New York 10016

a reply to the counterclaims contained within the answer which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON

Clerk of Court.

Deputy Clerk.

Date: MAY 3 - 1971

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

59 Summons

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH and GROSS & CO.

Defendants,

NEWBURGER, LOEB & CO. a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, and CHARLES SLOANE,

Additional Defendants on Counterclaims

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ANSWER AND COUNTERCLAIMS

71 Index No. 685

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
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Defendants Gross & Co., Charles H. Gross, Mabel Bleich, and Jeanne Donoghue, a Limited Partner of Gross & Co., by their attorneys, GOLDEN, WIENSHIENK & MANDEL, for their answer and counterclaims allege as follows:

FIRST DEFENSE

1. Defendants deny each and every allegation set forth in paragraphs 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 25, 27, 28.

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AS A SECOND DEFENSE AND AS A FIRST COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, MABEL BLEICH AND JEANNE DONOGHUE AGAINST PLAINTIFF AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

2. The Court has pendent and ancillary jurisdiction of all counterclaims set forth in this answer.

3. The purported assignment of the Buckleys' causes of action from Newburger, Loeb & Co. (hereinafter referred to as "The Partnership") to plaintiff is contained in an agreement dated December 31, 1970 by which all of the assets, business and goodwill of The Partnership are purported to be transferred and assigned to Newburger, Loeb & Co. Inc. (hereinafter referred to as the "Transfer Agreement"), which agreement was executed in New York.

4. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank, Charles Sloane, and Fred Kayne were all partners or former partners of The Partnership who executed and approved the Transfer Agreement.

5. Alex Aixala, Robert Muh, Paul Risher and Fred Kayne were all promoters and organizers of plaintiff who negotiated, planned, executed and approved the Transfer Agreement.

6. The Transfer Agreement is ineffective, void and a nullity for the following reasons:

(a) It was executed in violation of Section 98 of The Partnership Law of the State

of New York, without the consent and over the objection of Mabel Bleich and Jeanne Donoghue who were limited partners.

(b) It was executed in a course of fraudulent self-dealing on the part of general partners of The Partnership, some of whom received special treatment in the nature of forgiveness of indebtedness owed to The Partnership; and some of whom received employment and offices in the plaintiff corporation; and some of whom received securities in plaintiff corporation; all such wrongs having been committed in New York.

(c) Plaintiff and all of the persons named as additional defendants on counterclaims had knowledge of and participated in the wrongs set forth above in this paragraph by joining in the Transfer Agreement.

7. The transfer of The Partnership assets to the plaintiff under color of the Transfer Agreement must be set aside and plaintiff, together with all persons named as counterclaim defendants are liable for damages for conversion in connection therewith.

THIRD DEFENSE

8. The Partnership was the broker of record with regard to each and every stock transaction of the Buckleys referred to in the complaint, and the Buckley account was maintained by The Partnership, which received all

payments from the Buckleys, issued all confirmations and statements, and held the Buckleys' securities in margin account.

9. The Partnership had the primary responsibility to properly review and supervise the transactions in the Buckley account to prevent the wrongs against the Buckleys alleged in the complaint. Gross & Co. merely acted as originating house in connection with said transactions, and neither Charles H. Gross, nor Mabel Bleich, nor Jeanne Donoghue had any personal contact with such transactions or with the Buckleys.

10. If any valid claim on behalf of the Buckleys existed as a result of the stock transactions mentioned in the complaint, which defendants upon information and belief deny, then The Partnership was guilty of the same as a primary or joint tort feasor. Accordingly, the claims asserted in the complaint by plaintiff as The Partnership's purported assignee are barred by public policy, by the Securities Acts of the United States, by the doctrines of pari delicto and unclean hands, and by the doctrine that a tort feasor may not bring an action based upon his wrongdoing.

AS A FOURTH DEFENSE AND SECOND COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, MABEL BLEICH AND JEANNE DONOGHUE AGAINST PLAINTIFF, AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON THE COUNTERCLAIMS

11. Defendants repeat and reiterate each and every allegation of paragraphs 2, 3, 8, 9 and 10.

12. On and prior to August 19, 1966 the Buckleys maintained a margin account with The Partnership with

regard to which Gross & Co. was the originating house.

13. On or about August 19, 1966 the Buckleys were indebted to The Partnership in the approximate amount of $332,345.00, and The Partnership held as collateral for said debt approximately 11,000 shares of Westec stock. At said time the market price of Westec stock collapsed as a result of certain frauds committed by the Westec management, and the Securities and Exchange Commission issued orders to stop trading in Westec stock. Upon information and belief, the suspension of trading in Westec made it impossible for The Partnership to realize upon its security for the debt owed by the Buckleys. When pressed for payment by The Partnership, the Buckleys delivered financial statements showing that they were now insolvent and were unable to pay.

14. For a number of years after 1966 negotiations continued between The Partnership and the Buckleys with a view to collecting or compromising the sums owed by the Buckleys. The Buckleys in such negotiations indicated that if pressed too hard they would be forced into bankruptcy, but if The Partnership would forgive most of the indebtedness, a substantial sum would be paid in satisfaction by Mr. Buckley's father. No resolution of the Buckley debt was reached during 1966, 1967, 1968 or 1969.

15. In or about 1969 the business of Gross & Co. was discontinued, and Charles H. Gross joined The Partnership, Newburger, Loeb & Co., as a general partner, and Mabel Bleich and Jeanne Donoghue joined The Partnership as limited partners. Mabel Bleich and Jeanne Donoghue continued to

be limited partners of The Partnership during all relevant times.

16. At all relevant times The Partnership of Newburger, Loeb & Co. was constituted and governed by a certain document entitled "Restated Articles on Limited Partnership of Newburger, Loeb & Co." as amended dated as of February 26, 1970 (hereinafter referred to as the "Partnership Agreement").

17. At all times Charles H. Gross was a signatory of the Partnership Agreement as a general partner, with a capital contribution of $412,500 which capital contribution Charles H. Gross made in full. In addition to such mandatory capital contribution Charles H. Gross paid in $485,102.00 as additional capital pursuant to the Partnership Agreement.

18. Charles H. Gross continued as a general partner until on or about September 30, 1970, when he gave notice of withdrawal. Under the Partnership Agreement Charles H. Gross thereafter, and at all relevant times had the following status as a withdrawing partner:

(a) He continued to share in losses and profits of The Partnership for the balance of the calendar year 1970;

(b) His capital remained at the risk of the business for the period of twelve calendar months from the effective date of notice of withdrawal, and remained capital of The Partnership;

(c) He ceased to have any voice in the management of the business.

19. By reason of the foregoing facts a fiduciary obligation was owed to Jeanne Donoghue, Mabel Bleich and Charles H. Gross at all relevant times by The Partnership Newburger, Loeb & Co. all of its partners and all of its officers, agents, managing employees, and attorneys.

20. In 1970 The Partnership commenced an arbitration against the Buckleys demanding judgment on said debt, and the Buckleys asserted various set-offs and counterclaims in said arbitration, including a counterclaim of alleged churning of their accounts.

21. Set-offs and counterclaims were asserted by the Buckleys solely against The Partnership. The Buckleys asserted no claim against Gross & Co., and upon information and belief at no time had any intention to assert a claim against Gross & Co.

22. Upon information and belief defacto control of the business and affairs of Newburger, Loeb & Co. was given by the general partners thereof on or about the Fall of 1970 to Fred Kayne, a partner, together with Robert Muh and Paul Risher who were managing employees of said Partnership.

23. In the latter part of 1970 the attorneys representing The Partnership in the arbitration of the Buckleys were the same attorneys who then represented Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Alex Aixala and plaintiff, Newburger, Loeb & Co. Inc. in negotiations

then pending for the transfer of the assets and business of The Partnership to plaintiff.

24. Said attorneys owed a fiduciary duty to The Partnership, and to Mabel Bleich, Jeanne Donoghue and Charles H. Gross in connection with their handling of the Buckley arbitration.

25. In settlement negotiations with the Buckleys said attorneys insisted that as a condition of settlement the Buckleys must assert a claim against Gross & Co. and assign the same to The Partnership and further that the Buckleys must agree to "co-operate" in the prosecution of such assigned claim.

26. On or about December 30, 1970 The Partnership and the Buckleys executed settlement papers under which, among other things, the Buckleys agreed to pay $50,000.00 to be obtained from Mr. Buckley's father, and also assigned to The Partnership a claim against Gross & Co.

27. The settlement was made by The Partnership and by said attorneys in violation of the fiduciary obligation owed by them to Mabel Bleich, Jeanne Donoghue and Charles Gross, despite the aforesaid conflicts of interest, and without affording them the opportunity to be represented by separate counsel.

28. The foregoing acts were performed by such general partners, managing agents, and the attorneys purportedly representing The Partnership against the best interest of The Partnership and with the fraudulent intent of causing said Partnership to reassign the claim to

Newburger, Loeb & Co. Inc. so that said corporation could utilize the claim as a pretext for holding and using the capital of Mabel Bleich, Jeanne Donoghue and Charles H. Gross, after the dissolution of The Partnership and during the pendency of protracted litigation.

29. Plaintiff and each counterclaim defendant executed the Transfer Agreement and caused the wrongful delivery of all of the assets of The Partnership to Newburger, Loeb & Co. Inc., including the respective capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross.

30. At the time of such wrongful delivery of such assets and capital to Newburger, Loeb & Co. Inc. the capital interest of Mabel Bleich was $75,000.00 plus interest.

31. At the time of such wrongful delivery of such assets and capital to Newburger, Loeb & Co. Inc. the capital interest of Jeanne Donoghue was $75,000.00 plus interest.

32. At the time of such wrongful delivery of such assets and capital to Newburger, Loeb & Co. the capital interest of Charles H. Gross, was upon information and belief, in excess of $400,000.00. The exact amount of the capital interest of Charles H. Gross is unknown because the same is dependent upon the profits and losses of The Partnership during the calendar year 1970, which figures have not been fairly and honestly stated and reported to Gross by The Partnership or the other counterclaim defendants.

33. Upon information and belief the capital interest of Mabel Bleich, Jeanne Donoghue and Charles H. Gross, thus wrongfully converted, make up and constitute, and were intended to make up and constitute, the major portion of the liquid working capital of Newburger, Loeb & Co. Inc.

34. By delivering and purporting to transfer the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross to Newburger, Loeb & Co. Inc. the consenting partners of The Partnership acted in a fraudulent breach of their fiduciary duties to Mabel Bleich, Jeanne Donoghue and Charles H. Gross; and the other counterclaim defendants and Newburger, Loeb & Co. Inc. participated in such wrongs by executing the Transfer Agreement and by performing the other acts herein set forth.

35. Alex Aixala, Fred Kayne, Robert Muh, Paul Risher and Charles Sloane required on behalf of plaintiff corporation that the general partners of The Partnership perform the steps and take the acts set forth above as a pre-requisite of the Transfer Agreement.

36. By reason of the foregoing plaintiff is estopped from asserting the claims set forth in the complaint.

37. By reason of the foregoing, plaintiff and counterclaim defendants are constructive Trustees, or Trustees de son tort of the aforesaid capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross, and are required to account for such capital interests and for

all profits realized with or in connection with such capital interests and to pay damages.

FIFTH DEFENSE

38. Defendants repeat and reiterate each and every allegation of paragraphs 20, 21, 22, 23, 24, 25, 26, and 27.

39. The claims set forth in the complaint are champertous.

SIXTH DEFENSE

40. Upon information and belief the Buckleys executed a general release on or about December 30, 1970, which release releases and discharges the claims set forth in the complaint.

SEVENTH DEFENSE

41. Defendants repeat and reiterate each and every allegation of paragraphs 8, 9, 10, and 26.

42. Said assignment of the Buckleys' claim to a joint tort feasor operated as a release and discharge thereof.

EIGHTH DEFENSE

43. The claims set forth in the complaint are barred in whole or in part because not timely brought within applicable statutes of limitations.

NINTH DEFENSE

44. The complaint fails to state a claim upon which relief can be granted.

AS A THIRD COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, MABEL BLEICH, and JEANNE DONOGHUE AGAINST PLAINTIFF AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

45. Defendants repeat and reiterate each and every allegation of paragraphs 2 through 6 inclusive, and 15 through 35 inclusive.

46. In or about the Fall of 1970 counterclaim defendants conceived of a plan to transfer business assets and goodwill of Newburger, Loeb & Co. to a corporation known as Newburger, Loeb & Co. Inc. from which transfer the individual counterclaim defendants planned and expected to receive certain benefits.

47. The counterclaim defendants knew and understood that The Partnership business and assets could not legally be transferred to such corporation without the consent of Mabel Bleich, Jeanne Donoghue, and Charles H. Gross, and further that as a practical matter such plan could not succeed unless the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross were retained in the business.

48. Said counterclaim defendants further knew and understood that Charles H. Gross was anxious to receive return of his capital, and would not approve such plan, and further, knew that Jeanne Donoghue and Mabel Bleich had ties of family loyalty and personal loyalty to Charles H. Gross.

49. In order to force the consent of Mabel Bleich, Jeanne Donoghue and Charles H. Gross to such proposed transfer, or alternatively, if such consent could not be forced, in order to provide a method by which the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross could be retained under color of right, plaintiff and the counterclaim defendants entered into a conspiracy and course of conduct wherein they performed the following acts:

(a) They threatened that if such consents were not forthcoming, numerous causes of action would be brought against Charles H. Gross which would ruin and destroy him and drive him out of the securities business.

(b) They threatened that if such consents were not forthcoming, grounds would be found to delay the payment of the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross for many years through costly litigations.

(c) In December 1970 the counterclaim defendants and the attorneys representing The Partnership wrongfully fomented and stimulated the assertion of the Buckley claim against Gross & Co. in the manner set forth above.

(d) In order to induce assertion of the claim by the Buckleys against Gross & Co., and assignments thereof to The Partnership, the counterclaim defendants and the said attorneys settled the claim against the Buckleys improvi-

dently and upon disadvantageous terms.

(e) They executed the Transfer Agreement.

(f) In further pursuance of said plan and conspiracy counterclaim defendants wrongfully and maliciously destroyed a valuable opportunity Gross had for gainful employment as set forth in the Seventh Counterclaim below.

FOURTH COUNTERCLAIM ASSERTED ON BEHALF OF MABEL BLEICH, AGAINST PLAINTIFF, NEWBURGER, LOEB & CO., ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK AND FRED KAYNE.

50. Defendants repeat and reiterate each and every allegation of paragraph 2.

51. On and prior to December 31, 1970 a partnership known as Newburger, Loeb & Co. existed pursuant to certain agreement entitled "Restated Articles of Limited Partnership" (hereinafter referred to as the "Partnership Agreement"). Said partnership ceased to do business on or about January 1, 1971.

52. Pursuant to the terms of the Partnership Agreement Mabel Bleich was entitled to receive upon dissolution the sum of $75,000.00 said sum being her capital, plus interest from and after June 30, 1970.

53. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne being general partners of The

Partnership are jointly and severally liable to Mabel Bleich for payment to her of such capital, plus interest.

54. By the Transfer Agreement plaintiff Newburger, Loeb & Co. Inc. assumed and agreed to pay said capital, plus interest to Mabel Bleich, and if the transaction set forth in the Transfer Agreement should not be set aside, then Newburger, Loeb & Co. Inc. is liable to Mabel Bleich for said sum.

AS A FIFTH COUNTERCLAIM ASSERTED ON BEHALF OF JEANNE DONOGHUE AGAINST PLAINTIFF, NEWBURGER, LOEB & CO., ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADLOPHUS ROGGENBURG, NED D. FRANK, AND FRED KAYNE

55. Defendants repeat and reallege each and every allegation in paragraphs 2 and 51.

56. Pursuant to the terms of the Partnership Agreement Jeanne Donoghue was entitled to receive upon dissolution the sum of $75,000.00, said sum being her capital, plus interest from and after June 30, 1970.

57. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne being general partners of The Partnership are jointly and severally liable to Jeanne Donoghue for payment to her of such capital, plus interest.

58. By the Transfer Agreement plaintiff, Newburger, Loeb & Co. Inc. assumed and agreed to pay said capital to Jeanne Donoghue, and if the transaction set forth in the

Transfer Agreement should not be set aside, then Newburger, Loeb & Co. Inc. is liable to Jeanne Donoghue for said amount.

AS A SIXTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, AGAINST NEWBURGER, LOEB & CO. INC. ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK AND FRED KAYNE

59. Defendants repeat and reiterate each and every allegation in paragraphs 2 and 51.

60. Pursuant to the terms of the Partnership Agreement Charles H. Gross was entitled to receive upon dissolution the amount of his capital which was, upon information and belief, in excess of $400,000.00. By reason of Charles Gross's participation in profits and losses until December 31, 1970 his capital as at said date can only be determined by an accounting, which plaintiff and the counterclaim defendants have failed and refused to furnish him.

61. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne being general partners of The Partnership are jointly and severally liable to Charles H. Gross for payment to him of such capital, plus interest.

62. By the Transfer Agreement plaintiff Newburger, Loeb & Co. Inc. assumed and agreed to pay said capital to Charles H. Gross, and if the transaction set forth in the Transfer Agreement should not be set aside, then Newburger, Loeb & Co. Inc. is liable to Charles H. Gross for said

capital, plus interest.

AS A SEVENTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, AGAINST PLAINTIFF, AND ALL OF THE PERSONS NAMED AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

63. Defendants repeat and re terate each and every allegation in paragraphs 2, 3, 4, 5, 6, 15, 18, 19 and 51.

64. Rafkind & Company, Inc. (hereinafter referred to as "Rafkind") was at all relevant times a New York corporation engaged in the securities and brokerage business in New York City.

65. On or about January 1971 Rafkind and Charles H. Gross reached an understanding that Rafkind would employ Gross as a securities trader on the following basis: Rafkind would make available a fund of $500,000.00 with which Gross would trade on the New York and American Stock Exchanges, and all profits would be shared equally by Rafkind and Gross.

66. Charles H. Gross had many years of successful experience as a securities trader and the proposed employment with Rafkind had a value to him in excess of $150,000.00 per annum.

67. Plaintiff and counterclaim defendants wrongfully and maliciously caused Newburger, Loeb & Co. to state to Rafkind that the proposed employment of Gross would violate the Partnership Agreement, and that Newburger, Loeb & Co. refused clearance pursuant to stock exchange regulations as requested by Rafkind.

68. By reason of such statement by Newburger, Loeb & Co. Rafkind withdrew from the understanding it had reached with Charles H. Gross and refused to proceed with such contemplated employment.

69. By reason of the foregoing, Charles H. Gross suffered damages in the amount of $300,000.00.

AS A EIGHTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, AGAINST PLAINTIFF, AND ALL OF THE PERSONS NAMED AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

70. The action asserted in this counterclaim arises under a law of the United States to protect trade and commerce against restraints and monopolies, in particular, the Sherman Anti-Trust Act, and the Clayton Act, 15, U.S.C. Section 1 et. seq.

71. Defendants repeat and reiterate each and every allegation in paragraphs 2, 3, 4, 5, 6, 15, 18, 19, 51, 64, 65, 66, 67, and 68.

72. Said acts committed by the plaintiff and counterclaim defendants were in violation of the said anti-trust laws of the United States.

73. By reason of the foregoing, Charles H. Gross has suffered damages in the amount of $300,000.00 and is entitled under Section 4 of the said Clayton Act, 15 U.S.C. Section 15, to threefold damages in the amount of $900,000.00.

WHEREFORE, defendants demand judgment as follows:

1. Dismissing the complaint with costs together with an award of counsel fees.

2. On the first counterclaim:

Setting aside the transfer agreement; directing that all of the assets of The Partnership be returned to The Partnership or to a receiver for The Partnership; directing dissolution of The Partnership and awarding damages and counsel fees against plaintiff and all counterclaim defendants, together with costs and attorneys fees.

3. On the second counterclaim:

Requiring plaintiff and all counterclaim defendants to account to Mabel Bleich, Jeanne Donoghue and Charles H. Gross for their capital interests, and to pay over the same together with all gains and profits realized thereupon or in connection therewith, and to pay any losses or damages; together with punitive damages in the amount of $500,000.00, costs and counsel fees.

4. On the third counterclaim:

Awarding damages in the amount of $100,000.00 each to Mabel Bleich and Jeanne Donoghue and in the amount of $500,000.00 to Charles H. Gross, together with punitive damages in a like amount to each such defendant plus costs and attorneys fees.

5. On the fourth counterclaim:

Judgment in favor of Mabel Bleich in the amount of $75,000.00 plus interest from June 30, 1970, said judgment to run jointly and severally against plaintiff, The Partnership, and Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne.

6. On the fifth counterclaim:

Judgment in favor of Jeanne Donoghue in the amount of $75,000.00 plus interest from June 30, 1970, said judgment to run jointly and severally against plaintiff, The Partnership, and Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne.

7. On the sixth counterclaim:

Judgment in favor of Charles H. Gross for an accounting of his partnership capital as of December 31, 1970, together with payment; and that said sum be paid to him together with interest and costs, said judgment to run jointly and severally against plaintiff, The Partnership and Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne.

8. On the seventh counterclaim:

Judgment on behalf of Charles H. Gross in the amount of $300,000.00 plus punitive damages in the amount of $500,000.00 plus costs and attorneys fees.

9. On the eighth counterclaim:

Judgment on behalf of Charles H. Gross in the amount of $900,000.00 plus costs and attorneys fees.

GOLDEN, WIENSHIENK & MANDEL

By: _____
Philip Mandel
A Member of the Firm
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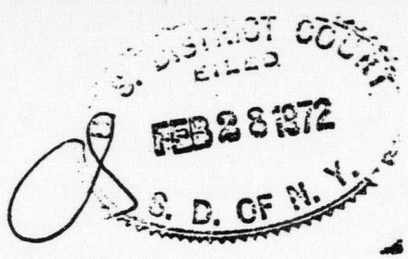
AMENDED ANSWER & COUNTERCLAIMS

Owen J. Jr. Sungaard



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH AND GROSS & CO.

Defendants,

NEWBURGER, LOEB & CO. a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERKSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims

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AMENDED
ANSWER AND COUNTERCLAIMS

71 Index No. 685

Defendants Gross & Co., Charles H. Gross, Mabel Bleich, and Jeanne Donoghue, a Limited Partner of Gross & Co., by their attorneys, GOLDEN, WIENSHIENK & MANDEL, for their answer and counterclaims allege as follows:

FIRST DEFENSE

1. Defendants deny each and every allegation set forth in paragraphs 2, 3, 4, 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 25, 27, 28.

AS A SECOND DEFENSE AND AS A FIRST COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, MABEL BLEICH AND JEANNE DONOGHUE AGAINST PLAINTIFF AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

2. The Court has pendent and ancillary jurisdiction of all counterclaims set forth in this answer.

3. The purported assignment of the Buckleys' causes of action from Newburger, Loeb & Co. (hereinafter referred to as "The Partnership") to plaintiff is contained in an agreement dated December 31, 1970 (hereinafter referred to as the "Transfer Agreement"), by which all of the assets, business and goodwill of The Partnership are purported to be transferred and assigned to Newburger, Loeb & Co. Inc. (hereinafter referred to as "the Corporation") which agreement was executed in New York.

4. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Charles Sloane, and Fred Kayne were all partners or former partners of The Partnership who executed the Transfer Agreement on behalf of The Partnership.

5. Upon information and belief John F. Settel and Ned D. Frank were partners or former partners of The Partnership who did not execute the Transfer Agreement on behalf of The Partnership. Upon information and belief John F. Settel and Ned D. Frank received securities of the Corporation under the Transfer Agreement and to that extent participated therein.

6. Alex Aixala, Robert Muh, Paul Risher, Fred Kayne, Lawrence J. Berkowitz and Robert S. Persky were all promoters and organizers of the Corporation who negotiated, planned, executed and approved the Transfer Agreement, and all became security

holders of the Corporation. Robert S. Persky and the law firm of Finley, Kumble, Underberg, Persky & Roth (hereinafter "Finley, Kumble"), of which he was a partner, acted as attorneys for the Corporation in connection with the Transfer Agreement and also purported to act as special counsel for The Partnership in rendering an opinion concerning the Transfer Agreement.

7. The Transfer Agreement is ineffective, void and a nullity because it was executed in violation of Section 98 of The Partnership Law of the State of New York, without the consent of all of the general and limited partners.

8. The transfer of The Partnership assets to the plaintiff under color of The Transfer Agreement must be set aside and the Corporation, together with all persons named as counterclaim defendants, are liable for damages and to account for their profits in connection therewith.

THIRD DEFENSE

9. Defendants repeat and reiterate each and every allegation of paragraphs 3 through 6 inclusive.

10. The Transfer Agreement is ineffective void and a nullity because it was induced by fraudulent special considerations given to certain of the general partners, as set forth in paragraph 47 below, and it was negotiated and executed by the Corporation and the additional defendants on counterclaims as part of a fraudulent conspiracy against Gross, Donoghue and Bleich, and in violation of fiduciary duties owed to Gross, Donoghue and Bleich, all as set forth in paragraphs 16 through 49, and 60 through 64 below.

11. The transfer of The Partnership assets to the Corporation under color of the Transfer Agreement must be set aside and plaintiff, together with all persons named as counterclaim defendants, are liable for damages and to account

for their profits in connection therewith. 34

FOURTH DEFENSE

12. The Partnership was the broker of record with regard to each and every stock transaction of the Buckleys referred to in the complaint, and the Buckley account was maintained by The Partnership, which received all payments from the Buckleys, issued all confirmation and statements, and held the Buckleys' securities in margin account.

13. The Partnership had the primary responsibility to properly review and supervise the transactions in the Buckley account to prevent the wrongs against the Buckleys alleged in the complaint. Gross & Co. merely acted as originating house in connection with said transactions, and neither Charles H. Gross, nor Mabel Bleich, nor Jeanne Donoghue had any personal contact with such transactions or with the Buckleys.

14. If any valid claim on behalf of the Buckleys existed as a result of the stock transactions mentioned in the complaint, which defendants upon information and belief deny, then The Partnership was guilty of the same as a primary or joint tort feasor. Accordingly, the claims asserted in the complaint by the Corporation as The Partnership's purported assignee are barred by public policy, by the Securities Acts of the United States, by the doctrines of pari delicto and unclean hands, and by the doctrine that a tort feasor may not bring an action based upon his wrongdoing.

AS A FIFTH DEFENSE AND SECOND COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, MABEL BLEICH AND JEANNE DONOGHUE AGAINST PLAINTIFF, AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON THE COUNTERCLAIMS

15. Defendants repeat and reiterate each and every

allegation of paragraphs 3, 4, 5, 6, 7, 10, 12, 13 and 14.

16. On and prior to August 19, 1966 the Buckleys maintained a margin account with The Partnership with regard to which Gross & Co. was the originating house.

17. On or about August 19, 1966 the Buckleys were indebted to The Partnership in the approximate amount of $332,345.00, and The Partnership held as collateral for said debt approximately 11,000 shares of Westec stock. At said time the market price of Westec stock collapsed as a result of certain frauds committed by the Westec management, and the Securities and Exchange Commission issued orders to stop trading in Westec stock. Upon information and belief, the suspension of trading in Westec made it impossible for The Partnership to realize upon its security for the debt owed by the Buckleys. When pressed for payment by The Partnership, the Buckleys delivered financial statements showing that they were now insolvent and were unable to pay.

18. For a number of years after 1966 negotiations continued between The Partnership and the Buckleys with a view to collecting or compromising the sums owed by the Buckleys. The Buckleys in such negotiations indicated that if pressed too hard they would be forced into bankruptcy, but if The Partnership would forgive most of the indebtedness, a substantial sum would be paid in satisfaction by Mr. Buckley's father. No resolution of the Buckley debt was reached during 1966, 1967, 1968, 1969 or until December of 1970.

19. During all of said time, namely from August 1966 until December 1970, no claim was asserted formally or informally by the Buckleys or by The Partnership against Gross & Co. or

against Gross, Donoghue or Bleich.

20. In or about 1969 the business of Gross & Co. was discontinued, and Charles H. Gross joined The Partnership, Newburger, Loeb & Co., as a general partner, and Mabel Bleich and Jeanne Donoghue joined The Partnership as limited partners. Mabel Bleich and Jeanne Donoghue continued to be limited partners of The Partnership during all relevant times.

21. At all relevant times The Partnership of Newburger, Loeb & Co. was constituted and governed by a certain document entitled "Restated Articles on Limited Partnership of Newburger, Loeb & Co." as amended dated as of February 26, 1970 (hereinafter referred to as the "Partnership Agreement").

22. At all times Charles H. Gross was a signatory of The Partnership Agreement as a general partner, with a capital contribution of $412,500 which capital contribution Charles H. Gross made in full. In addition to such mandatory capital contribution Charles H. Gross paid in $485,102.00 as additional capital pursuant to the Partnership Agreement.

23. Charles H. Gross continued as a general partner until on or about September 30, 1970, when he gave notice of withdrawal. Under the Partnership Agreement Charles H. Gross thereafter, and at all relevant times had the following status as a withdrawing partner:

(a) He continued to share in losses and profits of The Partnership for the balance of the calendar year 1970;

(b) His capital remained at the risk of the business for the period of twelve calendar months from the effective date of notice of withdrawal,

and remained capital of The Partnership;

(c) He ceased to have any voice in the management of the business.

24. By reason of the foregoing facts a fiduciary obligation was owed to Jeanne Donoghue, Mabel Bleich and Charles H. Gross at all relevant times by The Partnership Newburger, Loeb & Co. all of its partners and all of its officers, agents, managing employees, and attorneys.

25. In 1970 The Partnership commenced an arbitration against the Buckleys demanding judgment on said debt, and the Buckleys asserted various set-offs and counterclaims in said arbitration, including a counterclaim of alleged churning of their accounts.

26. Such set-offs and counterclaims were asserted by the Buckleys solely against The Partnership. The Buckleys asserted no claim against Gross & Co., and upon information and belief at no time had any intention to assert a claim against Gross & Co.

27. Upon information and belief defacto control of the business and affairs of Newburger, Loeb & Co. was given by the general partners thereof on or about the Fall of 1970 to Fred Kayne, a partner, together with Robert Muh and Paul Risher who were managing employees of said Partnership.

28. At all relevant times Robert S. Persky was a partner in Finley, Kumble and all acts performed by Persky as attorney were performed on behalf of said law firm, which is liable for such acts.

29. Upon information and belief Kayne, Muh and Risher in the Fall of 1970 evolved a plan to form a corporation owned

and controlled principally by themselves for the purpose of taking over the assets and business of The Partnership on terms favorable to the Corporation, and in connection with said plans Kayne, Muh and Risher caused The Partnership to employ Lawrence J. Berkowitz as inside house counsel and caused The Partnership to retain Robert S. Persky and the law firm of Finley, Kumble, as attorneys to represent The Partnership in various matters.

30. Upon information and belief Persky in the Fall of 1970 introduced Risher, Kayne and Muh to defendant Alex Aixala who agreed to furnish "new capital" to the proposed corporation in connection with the said plan to acquire the assets of business of The Partnership.

31. In the latter part of 1970 Risher, Kayne, Muh, and Persky caused The Partnership to substitute Persky and Finley, Kumble as the attorneys representing The Partnership in the arbitration against the Buckleys in place of prior attorneys.

32. Persky and Finley, Kumble in representing The Partnership with regard to the Buckley claim had a fiduciary duty to Charles Gross, Mabel Bleich, and Jeanne Donoghue.

33. During the time that Persky acted as attorney for The Partnership in the arbitration with the Buckleys he was also acting as attorneys for Risher, Kayne and Muh and for himself as promoters of the Corporation in connection with the negotiations between The Partnership and the Corporation.

34. During said period of time Persky and the general partners knew that Gross did not approve of the proposed sale

of The Partnership assets and business to the Corporation and that he might persuade Jeanne Donoghue and Mabel Bleich also to withhold their consent and approval from the proposed transaction, in which case Charles Gross and Jeanne Donoghue and Mabel Bleich would be entitled to return of their capital in full prior to any transfer of the assets of The Partnership. Upon information and belief the additional defendants on counterclaims all knew and understood that if the capital of Gross, Donoghue and Bleich were to be paid out to them there would be insufficient capital to enable the Corporation to secure the permission of the Stock Exchange to carry on the business formerly conducted by The Partnership. Further the defendants on counterclaim also knew and understood that if the capital of Gross, Donoghue and Bleich were to be paid out in full, other limited partners and subordinated lenders would refuse to approve the Transfer Agreement, and might force The Partnership into liquidation or receivership.

35. For the sole purpose of creating the color of a claim under which The Partnership and the Corporation could resist payment to Gross, Donoghue and Bleich of their capital, Persky and the other defendants on counterclaims asserted a new condition in December of 1970 in the settlement negotiations with the Buckleys. Persky now insisted that, as a condition of any settlement, the Buckleys must assert a claim against The Partnership of Gross & Co. and assign such claim to The Partnership of Newburger, Loeb & Co., and further that the Buckleys must agree to "co-operate" in the prosecution of such assigned claim. In so inspiring such a claim against Gross & Co., Persky and the other counterclaim defendants violated the fiduciary obligations as attorneys and partners respectively,

which they owed to Gross, Donoghue and Bleich.

36. On or about December 30, 1970 The Partnership and the Buckleys executed settlement papers under which, among other things, the Buckleys agreed to pay $50,000.00 to be obtained from Mr. Buckley's father, and also assigned to The Partnership a claim against Gross & Co. and agreed to co-operate in the prosecution of said claim.

37. The settlement was made by The Partnership and by said attorneys in violation of the fiduciary obligation owed by them to Mabel Bleich, Jeanne Donoghue and Charles Gross, despite the aforesaid conflicts of interest, and without affording them the opportunity to be represented by separate counsel in the negotiations with the Buckleys.

38. The foregoing acts were performed by such general partners, managing agents, and the attorneys purportedly representing The Partnership against the best interest of The Partnership and with the fraudulent intent of causing said Partnership to reassign the claim to Newburger, Loeb & Co. Inc. so that said corporation could utilize the claim as a pretext for holding and using the capital of Mabel Bleich, Jeanne Donoghue and Charles H. Gross, after the dissolution of The Partnership and during the pendency of protracted litigation.

39. Upon information and belief it was agreed when the Transfer Agreement was executed in December of 1970 that at or prior to the closing, and as a condition of the closing, an opinion of counsel for The Partnership would be rendered to the effect that the Partners executing the Transfer Agreement had the power and authority to do so. Upon information and belief the law firm then contemplated to render such opinion

on behalf of The Partnership was the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil. Upon information and belief at the time of the closing in February 1971 the said law firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil refused to render such an opinion, and thereafter Persky and Finley, Kumble agreed to render and did render such an opinion. In rendering such an opinion on behalf of The Partnership (seller) said Persky and Finley, Kumble acted in a triple conflict of interest in that they were also (a) attorneys for the Corporation (the buyer) and (b) attorneys for the individuals who were the promoters of the Corporation and (c) in that Persky was also a promoter and intended holder of securities of the Corporation.

40. Thereafter the Transfer Agreement was closed and plaintiff and the counterclaim defendants caused the wrongful delivery of all of the assets of The Partnership to the Corporation including the respective capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross.

41. At the time of such wrongful delivery of such assets and capital to Newburger, Loeb & Co. Inc. the capital interest of Mabel Bleich was $75,000.00 plus interest.

42. At the time of such wrongful delivery of such assets and capital to the Corporation the capital interest of Jeanne Donoghue was $75,000.00 plus interest.

43. At the time of such wrongful delivery of such assets and capital to Newburger, Loeb & Co. the capital interest of Charles H. Gross, was upon information and belief, in excess of $400,000.00. The exact amount of the capital interest of Charles H. Gross is unknown because the same is dependent upon the profits and losses of The Partnership during the calendar

year 1970, which figures have not been fairly and honestly stated and reported to Gross by The Partnership or the other counterclaim defendants.

44. Upon information and belief the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross, thus wrongfully converted, make up and constitute, and were intended to make up and constitute, the major portion of the liquid working capital of Newburger, Loeb & Co. Inc.

45. By delivering and purporting to transfer the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross to Newburger, Loeb & Co. Inc. the consenting partners of The Partnership acted in a fraudulent breach of their fiduciary duties to Mabel Bleich, Jeanne Donoghue and Charles H. Gross; and the other counterclaim defendants and Newburger, Loeb & Co. Inc. participated in such wrongs by joining in the Transfer Agreement and by performing the other acts herein set forth.

46. Alex Aixala, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane and Robert S. Persky required on behalf of plaintiff corporation that the general partners of The Partnership perform the steps and take the acts set forth above as a pre-requisite of the Transfer Agreement.

47. Said promoters of the Corporation induced certain of the general partners of The Partnership to perform such wrongful acts, and to execute the Transfer Agreement on behalf of the Partnership, by giving them fraudulent special considerations such as the foregiveness of substantial indebtedness owed to The Partnership, and employment or offices in the Corporation. Andrew M. Newburger for example was forgiven indebtedness which, upon information and belief, was in excess of $200,000.00.

48. By reason of the foregoing plaintiff is estopped

from asserting the claims set forth in the complaint.

49. By reason of the foregoing, plaintiff and counterclaim defendants are constructive Trustees, or Trustees de son tort of the aforesaid capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross, and are required to account for such capital interests and for all profits realized with or in connecti with such capital interests and to pay damages.

SIXTH DEFENSE

50. Defendants repeat and reiterate each and every allegation of paragraphs 12 through 47.

51. The claims set forth in the complaint are champertous.

SEVENTH DEFENSE

52. Upon information and belief the Buckleys executed a general release on or about December 30, 1970, which release releases and discharges the claims set forth in the complaint.

EIGHTH DEFENSE

53. Defendants repeat and reiterate each and every allegation of paragraphs 12 through 38.

54. Said assignment of the Buckleys' claim to a joint tort feasor operated as a release and discharge thereof.

NINTH DEFENSE

55. The claims set forth in the complaint are barred in whole or in part because not timely brought within applicable statutes of limitations.

TENTH DEFENSE

56. The complaint fails to state a claim upon which relief can be granted.

AS A THIRD COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS AGAINST PLAINTIFF AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

57. For some time prior to December 1970 The Partnership held as nominee certain individual property of Gross, namely:

Warrants to purchase 1,650 shares of Geon Incorporated;

Warrants to purchase 2,578 shares of Host Enterprises, Inc.

Warrants to purchase 3,094 shares of National CSS Inc. (formerly Computer Softwear Systems Inc.)

92 shares of Computer Productions, Inc.

Said warrants were held in The Partnership name only for the purposes of convenience, and said warrants did not constitute part of The Partnership capital. In connection with the Transfer Agreement The Partnership purported to transfer to the Corporation said property of Gross, and the Corporation knowingly and wilfully accepted assignment of such warrants, and has treated them as its own, and has failed and refused to return the same to Gross, and upon information and belief the Corporation has in some cases sold such property and retained the proceeds.

58. All of the additional defendants on counterclaims by joining in the Transfer Agreement and by their acts as attorneys, officers, directors and security holders of the Corporation have participated in said conversion of such warrants and are liable therefor as joint tort feasors with the Corporation.

59. By reason of the foregoing Gross has been damaged in the sum of $200,000.00.

AS A FOURTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, MABEL BLEICH, AND JEANNE DONOGHUE AGAINST PLAINTIFF AND AGAINST ALL PERSONS NAMED HEREIN AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

60. Defendants repeat and reiterate each and every allegation of paragraphs 12 through 47.

61. In or about the Fall of 1970 counterclaim defendants conceived of a plan to transfer the business, assets and goodwill of Newburger, Loeb & Co. to a corporation known as Newburger, Loeb & Co. Inc. from which transfer the individual counterclaim defendants planned and expected to receive certain benefits.

62. The counterclaim defendants knew and understood that The Partnership business and assets could not legally be transferred to such corporation without the consent of Mabel Bleich, Jeanne Donoghue, and Charles H. Gross, and further that as a practical matter such plan could not succeed unless the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross were retained in the business.

63. Said counterclaim defendants further knew and understood that Charles H. Gross was anxious to receive return of his capital, and would not approve such plan, and further knew that Jeanne Donoghue and Mabel Bleich had ties of family loyalty and personal loyalty to Charles H. Gross.

64. In order to force the consent of Mabel Bleich, Jeanne Donoghue and Charles H. Gross to such proposed transfer, or alternatively, if such consent could not be forced, in order to provide a method by which the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross could be retained under color of right, plaintiff and the counterclaim defendants entered into a conspiracy and course of conduct wherein they performed the following acts:

(a) They threatened that if such consents were not forthcoming, numerous causes of action would be brought against Charles H. Gross which would ruin and destroy him and drive him out of the securities business.

(b) They threatened that if such consents were not forthcoming, grounds would be found to delay the payment of the capital interests of Mabel Bleich, Jeanne Donoghue and Charles H. Gross for many years through costly litigations.

(c) In December 1970 the counterclaim defendants including Persky wrongfully fomented and stimulated the assertion of the Buckley claim against Gross & Co. in the manner set forth above.

(d) In order to induce assertion of the

claim by the Buckleys against Gross & Co., and assignments thereof to The Partnership, the counterclaim defendants and the said attorneys settled the claim against the Buckleys improvidently and upon disadvantageous terms.

(e) They executed the Transfer Agreement.

(f) In further pursuance of said plan and conspiracy counterclaim defendants wrongfully and maliciously destroyed a valuable opportunity Gross had for gainful employment as set forth in the Eighth Counterclaim below.

AS A FIFTH COUNTERCLAIM ASSERTED ON BEHALF OF MABEL BLEICH, AGAINST PLAINTIFF, NEWBURGER LOEB & CO., ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK AND FRED KAYNE.

65. Defendants repeat and reiterate each and every allegation of paragraphs 20, 21 and 40.

66. On and prior to December 31, 1970 a partnership known as Newburger, Loeb & Co. existed pursuant to the Partnership Agreement. Said partnership ceased to do business on or about January 1, 1971.

67. Pursuant to the terms of the Partnership Agreement Mabel Bleich was entitled to receive upon dissolution the sum of $75,000.00 said sum being her capital, plus interest

from and after June 30, 1970.

68. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenberg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne being general partners of The Partnership are jointly and severally liable to Mabel Bleich for payment to her of such capital, plus interest.

69. By the Transfer Agreement plaintiff Newburger, Loeb & Co. Inc. assumed and agreed to pay said capital, plus interest to Mabel Bleich, and if the transaction set forth in the Transfer Agreement should not be set aside, then Newburger, Loeb & Co. Inc. is liable to Mabel Bleich for said sum.

AS A SIXTH COUNTERCLAIM ASSERTED ON BEHALF OF JEANNE DONOGHUE AGAINST PLAINTIFF, NEWBURGER LOEB & CO., ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, and FRED KAYNE

70. Defendants repeat and reallege each and every allegation in paragraphs 20, 21, 40 and 66.

71. Pursuant to the terms of the Partnership Agreement Jeanne Donoghue was entitled to receive upon dissolution the sum of $75,000.00, said sum being her capital, plus interest from and after June 30, 1970.

72. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank

and Fred Kayne being general partners of The Partnership are jointly and severally liable to Jeanne Donoghue for payment to her of such capital, plus interest.

73. By the Transfer Agreement plaintiff, Newburger, Loeb & Co. Inc. assumed and agreed to pay said capital to Jeanne Donoghue, and if the transaction set forth in the Transfer Agreement should not be set aside, then Newburger, Loeb & Co. Inc. is liable to Jeanne Donoghue for said amount.

AS A SEVENTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, AGAINST NEWBURGER, LOEB & CO. INC. ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK AND FRED KAYNE

74. Defendants repeat and reiterate each and every allegation in paragraphs 20, 21, 40 and 66.

75. Pursuant to the terms of the Partnership Agreement Charles H. Gross was entitled to receive upon dissolution the amount of his capital which was, upon information and belief, in excess of $400,000.00. By reason of Charles Gross' participation in profits and losses until December 31, 1970 his capital as at said date can only be determined by an accounting, which plaintiff and the counterclaim defendants have failed and refused to furnish him.

76. Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne being general partners of The Partnership are jointly and severally liable to Charles H.

Gross for payment to him of such capital, plus interest.

77. By the Transfer Agreement plaintiff Newburger, Loeb & Co. Inc. assumed and agreed to pay said capital to Charles H. Gross, and if the transaction set forth in the Transfer Agreement should not be set aside, then Newburger, Loeb & Co. Inc. is liable to Charles H. Gross for said capital, plus interest.

AS AN EIGHTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, AGAINST PLAINTIFF, AND ALL OF THE PERSONS NAMED AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

78. Defendants repeat and reiterate each and every allegation in paragraphs 3 through 8, 21 through 23 and 66.

79. Rafkind & Company, Inc. (hereinafter referred to as "Rafkind") was at all relevant times a New York corporation engaged in the securities and brokerage business in New York City.

80. On or about January 1971 Rafkind and Charles H. Gross reached an understanding that Rafkind would employ Gross as a securities trader on the following basis: Rafkind would make available a fund of $500,000.00 with which Gross would trade on the New York and American Stock Exchanges, and all profits would be shared equally by Rafkind and Gross.

81. Charles H. Gross had many years of successful experience as a securities trader and the proposed employment with Rafkind had a value to him in excess of $150,000.00 per annum.

82. Plaintiff and counterclaim defendants wrongfully and maliciously caused Newburger, Loeb & Co. to state to Rafkind that the proposed employment of Gross would violate the Partnership Agreement, and that Newburger, Loeb & Co. refused clearance pursuant to stock exchange regulations as requested by Rafkind.

83. By reason of such statement by Newburger, Loeb & Co. Rafkind withdrew from the understanding it had reached with Charles H. Gross and refused to proceed with such contemplated employment.

84. By reason of the foregoing, Charles H. Gross suffered damages in the amount of $300,000.00.

AS A NINTH COUNTERCLAIM ASSERTED ON BEHALF OF CHARLES H. GROSS, AGAINST PLAINTIFF, AND ALL OF THE PERSONS NAMED AS ADDITIONAL DEFENDANTS ON COUNTERCLAIMS

85. The action asserted in this counterclaim arises under a law of the United States to protect trade and commerce against restraints and monopolies, in particular, the Sherman Anti-Trust Act, and the Clayton Act, 15, U.S.C. Section 1 et. seq.

86. Defendants repeat and reiterate each and every allegation in paragraphs 3 through 8, 21 through 23, 66, 79 through 84.

87. Said acts committed by the plaintiff and counterclaim defendants were in violation of the said anti-trust laws of the United States.

88. By reason of the foregoing, Charles H. Gross

has suffered damages in the amount of $300,000.00 and is entitled under Section 4 of the said Clayton Act, 15 U.S.C. Section 15, to threefold damages in the amount of $900,000.00.

WHEREFORE, defendants demand judgment as follows:

1. Dismissing the complaint with costs together with an award of counsel fee.

2. On the first counterclaim:

Setting aside the Transfer Agreement; directing that all of the assets of The Partnership and of plaintiff Corporation, Newburger, Loeb & Co. Inc. be turned over to a judicial receiver for distribution to Gross, Bleich and Donoghue, and to other creditors of Newburger, Loeb & Co. and Newburger, Loeb & Co. Inc. as their interest may appear; and awarding to Gross, Bleich and Donoghue damages and counsel fees against Newburger, Loeb & Co. Inc. and all counterclaim defendants, together with costs and attorneys fees.

3. On the second counterclaim:

Requiring plaintiff and all counterclaim defendants to account to Mabel Bleich, Jeanne Donoghue and Charles H. Gross for their capital interests, and to pay over the same together with all gains and profits realized thereupon or in connection therewith, and to pay any losses or damages; together with punitive damages in the amount of $500,000.00, costs and counsel fees.

4. On the third counterclaim:

Requiring plaintiff and all counterclaim defendants to deliver and assign to Gross all of such property belonging to Gross still in their possession, and to account to Gross

for, and to pay over to Gross all of the proceeds and profits of any such property previously disposed of, together with damages, interest, costs, attorneys fees and punitive damages.

5. On the fourth counterclaim:

Awarding damages in the amount of $100,000.00 each to Mabel Bleich and Jeanne Donoghue and in the amount of $500,000.00 to Charles H. Gross, together with punitive damages in a like amount to each such defendant plus costs and attorneys fees.

6. On the fifth counterclaim:

Judgment in favor of Mabel Bleich in the amount of $75,000.00 plus interest from June 30, 1970, said judgment to run jointly and severally against plaintiff, The Partnership, and Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne.

7. On the sixth counterclaim:

Judgment in favor of Jeanne Donoghue in the amount of $75,000.00 plus interest from June 30, 1970, said judgment to run jointly and severally against plaintiff, The Partnership, and Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne.

8. On the seventh counterclaim:

Judgment in favor of Charles H. Gross for an accounting of his partnership capital as of December 31, 1970,

and that said sum be paid to him together with interest and costs, said judgment to run jointly and severally against plaintiff, The Partnership and Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, Ned D. Frank and Fred Kayne.

9. On the eighth counterclaim:

Judgment on behalf of Charles H. Gross in the amount of $300,000.00 plus punitive damages in the amount of $500,000.00 plus costs and attorneys fees.

10. On the ninth counterclaim:

Judgment on behalf of Charles H. Gross in the amount of $900,000.00 plus costs and attorneys fees.

GOLDEN, WIENSHIENK & MANDEL

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ANSWER OF ADDITIONAL DEFENDANTS ON
COUNTERCLAIMS AND REPLY OF PLAINTIFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., etc.,
Plaintiff,

-against-

CHARLES GROSS, et al,
Defendants

-against-

NEWBURGER, LOEB & CO., et al
Additional Defendants on Counterclaims

71 Civ. 685

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ANSWER OF ADDITIONAL DEFENDANTS ON COUNTERCLAIMS AND REPLY OF PLAINTIFF

Plaintiff for its reply, and additional defendants on counterclaims for their Answer to the Amended Answer and Counterclaims of the defendants herein by their undersigned attorneys upon information and belief allege as follows:

FIRST DEFENSE

1. Deny each and every allegation of Paragraphs "2", "7" "8", "10", "11", "14", "29", "43", "44", "45", "48", "49", "51, "54", "55", "56", "58", "59", "61", "62", "64", "68", "76", "82", "83", "84", "87", and "88".

2. Deny each and every allegation of Paragraph "3" except admit that an agreement was entered into under date of December 31, 1970 which agreement speaks for itself and that said agreement was executed in New York.

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3. Deny each and every allegation of Paragraph "4" except admit that the individuals named therein were partners or former partners of the Partnership who executed the agreement.

4. Deny knowledge or information sufficient to form a belief as to each and every allegation of Paragraph "5" except admit that the individuals named therein were partners or former partners of the Partnership and that the agreement speaks for itself.

5. Deny each and every allegation of Paragraph "6" except admit that a Corporation was formed; that Paul Risher, Fred Kayne and Robert S. Persky amongst others were aware of and played various roles in the formation of said Corporation, which Corporation was formed in an attempt to ameliorate and solve the serious financial crisis confronting the Partnership which had resulted in ultimatums from the New York Stock Exchange that the Partnership was to be suspended and liquidated unless a substantial amount of new capital was obtained; and further admit that the individuals named in Paragraph "6" amongst others, became security holders of the Corporation; and further admit that Persky acted as attorney for the Corporation at the closing of said agreement; and that on the eve of closing under threat of suspension by the New York Stock Exchange with the consent of the Partnership and without objection from anyone Persky did give a letter opinion as special counsel for the Partnership which letter opinion speaks for itself; and that at such time Persky was a partner of the law firm of Finley, Kumble, et al.

6. In reply to the paragraphs incorporated by reference in Paragraphs "9", "15", "50", "53", "60", "65", "70", "74", "78", and "86" repeat and reallege the answers given herein to the paragraphs incorporated by reference in said Paragraphs with the same full force and effect as though fully set forth hereat.

7. Deny each and every allegation of Paragraph "12" except admit that the Partnership was and did act as the clearing firm for Gross & Co. and in said capacity did perform the ministerial backroom acts of acting as broker of record with respect to the Buckley stock transactions originated by Gross & Co. including the issuance of confirmations and statements.

8. Deny each and every allegation of Paragraph "13' except admit that Gross & Co. acted as the originating house in connection with the Buckley transaction and that Charles Gross, Mabel Bleich and Jeanne Donoghue as partners of Gross & Co. and the principals thereof had the primary responsibility of preventing the wrongs committed against the Buckleys alleged in the amended complaint by their partner and salesman who upon information and belief churned the Buckley account.

9. Deny each and every allegation of Paragraph "16", except admit that the Buckleys maintained a margin account with Gross & Co. during the period of time that Gross & Co. used the Partnership as its clearing house, and the Buckleys was one of the accounts cleared through the Partnership.

10. Deny each and every allegation of Paragraph "17" except admit that the Buckleys had a legal obligation to the

Partnership in the approximate amount of $332,345; that approximately 11,000 shares of Westic stock were held as collateral for said debt; that in or about August 19, 1966 there was a precipitous drop in the price of Westec stock; and that by reason of the drop in said stock price and its suspension from trading, nothing could be realized upon said stock by the Partnership; and that the Buckleys declined to make payment for said stock for a number of reasons.

11. Deny each and every allegation of Paragraph "18" except admit that amongst other things the Buckleys represented during negotiations in 1970 that they had no assets and if the claim against them were pressed they would be forced into bankruptcy, and that if a compromise would be arrived at a sum of money would be paid in satisfaction by Mr. Buckley's father, and that as of the beginning of December, 1970 there had been no final resolution of the dispute; and upon information and belief that during the period of time that Gross was managing partner, during which period of time the Partnership was in dire need of funds, no action was taken.

12. Deny knowledge or information sufficient to form a belief as to each and every allegation of Paragraph "19".

13. Admit each and every allegation of Paragraph "20" except deny that Bleich and Donoghue continued to be limited partners beyond December 31, 1970.

14. Admit each and every allegation of Paragraphs "21", and "25".

15. Deny each and every allegation of Paragraph "23", except admit that in breach of an oral agreement entered into between all the general partners of Newburger, Loeb on or about September 30, 1970 Gross gave notice of withdrawal as a general partner effective immediately and that thereafter he was no longer a general partner and his only claim was for money twelve months thereafter based upon a formula computation.

16. Deny each and every allegation of Paragraph "24", except admit that a reciprocal fiduciary duty was owed between the partners of said Partnership and Gross, Bleich and Donoghue while each of them was a partner in the Partnership.

17. Deny knowledge or information sufficient to form a belief as to each and every allegation of Paragraph "26", except admit that Gross & Co. was not a party to said arbitration proceeding and hence was not subject to the assertion of claims by the Buckleys against it.

18. Deny each and every allegation of Paragraph "27", except admit that from time to time during the Fall of 1970 Fred Kayne and Robert Muh and Paul Risher acting as independent consultants recommended the taking of specific action in the best interests of the Partnership as to the conduct of the business of the Partnership with the approval of the Managing Committee of the Partnership and other of the partners.

19. Deny each and every allegation of Paragraph "28, except admit that Robert S. Persky was a partner in Finley, Kumble during such period of time and all legal services rendered by Robert S. Persky as attorney during said period of time were performed as a partner of said law firm.

20. Deny each and every allegation of Paragraph "30", except admit that during the late Fall of 1970 Persky had a conversation with one Alex Aixala the result of which was that Aixala stated that he would be willing to supply desperately needed "new capital" in the amount of approximately $1,000,000 to an entity provided that certain terms and conditions were met by said entity.

21. Deny each and every allegation of Paragraph "31", except admit that in the latter part of 1970 the Partnership decided to and in fact substituted Finley, Kumble as the attorneys for the Partnership in the arbitration proceeding against the Buckleys in place of prior attorneys.

22. Deny each and every allegation of Paragraph "32", except admit that Persky and Finley, Kumble in representing the Partnership had a fiduciary duty to the Partnership as an entity as opposed to any single partner or group of partners therein.

23. Deny each and every allegation of Paragraph "33", except admit that Persky did act as attorney for the Partnership in part of the arbitration with the Buckleys, and the eventual resolution of that controversy.

24. Deny each and every allegation of Paragraph "34, except admit that Gross did not consent to the proposed sale.

25. Deny each and every allegation of Paragraph "35", except admit that the Partnership and Persky, in good faith believed that the Partnership had various claims against Gross & Co. and the partners thereof, resulting in the commencement of this instant action by Newburger, Loeb & Co., Inc.

26. Deny each and every allegation of Paragraph "36", except admit that on or about December 30, 1970 the Partnership and the Buckleys executed settlement papers which settlement papers speak for themselves.

27. Deny each and every allegation of Paragraph "37", except admit that Gross & Co. and the Partners thereof were not represented at said settlement which was between the Partnership and the Buckleys.

28. Deny each and every allegation of Paragraph "38", except admit that the Partnership pursuant to and under the terms of the agreement did assign to Newburger, Loeb & Co., Inc. its assets and liabilities including claims it had against third persons such as the instant claims against Gross & Co. and the partners in Gross & Co.

29. Deny each and every allegation of Paragraph "39" except admit that at the time of the closing Persky and Finley Kumble acting as special counsel for the Partnership did render an opinion which speaks for itself at the request of, and with the consent of the elements of the Partnership present at said closing.

30. Deny each and every allegation of Paragraph "40", except admit that the agreement was closed and that pursuant to said agreement, and in compliance with the terms and provisions thereof, transfer of the assets and liabilities described therein was made by the Partnership to the Corporation.

31. Deny each and every allegation of Paragraph "41", except admit that pursuant to said agreement to the extent that Mabel Bleich had a "capital interest" such interest was transferred to Newburger, Loeb & Co., Inc. along with the Partnership

liabilities to which said interest was subject.

32. Deny each and every allegation of Paragraph "42", except admit that to the extent that Jeanne Donoghue had a "capital interest" such interest was transferred to Newburger, Loeb & Co., Inc. along with the Partnership liabilities to which said interest was subject.

33. Deny each and every allegation of Paragraph "46", except admit that the Partnership did fulfill the obligations imposed upon it pursuant to and under the terms of said Agreement.

34. Deny each and every allegation of Paragraph "47", except admit that all partners were treated pursuant to and in conformity with the explicit terms and conditions set forth in the Agreement which Agreement speaks for itself.

35. Deny each and every allegation of Paragraph "52", except admit that on or about December 30, 1970 the Buckley's signed a release which speaks for itself.

36. Deny each and every allegation of Paragraph "57" except admit that the warrants and shares of stock specified in that Paragraph were in fact held by the partnership as partnership assets and not in any nominee capacity.

37. Deny each and every allegation of Paragraph "63", except admit that Gross believed that he could use and attempted to use his position to blackjack and extort moneys from the Partnership for himself, Bleich and Donoghue substantially in excess of what each of them were entitled to receive by withholding their consent to the proposed reorganization of the Partnership as agreed to by all other general and special partners.

38. Deny each and every allegation of Paragraph "66" except admit that the Partnership known as Newburger, Loeb & Co. ceased to do business actively on or about January 1, 1971 and thereafter continued as a Partnership in liquidation.

39. Deny each and every allegation of Paragraph "67", except admit the execution of a Partnership agreement the terms and provisions of which speaks for itself.

40. Deny each and every allegation of Paragraph "69", except admit execution of the Agreement by the parties thereto, which Agreement speaks for itself.

41. Deny each and every allegation of Paragraph "71" except admit execution of a Partnership Agreement by the parties thereto the terms and conditions of which speak for themselves.

42. Deny each and every allegation of Paragraph "72", except admit that at various times during 1970 the foregoing were general partners of the partnership and as such had the rights, duties and obligation imposed by the Partnership Agreement and by and under New York law.

43. Deny each and every allegation of Paragraph "73", except admit execution of the agreement by the parties thereto, which Agreement speaks for itself.

44. Deny each and every allegation of Paragraph "75", except allege that upon information and belief an informal accounting was rendered Gross by virtue of the books and records of the Partnership being made fully available for inspection of Gross and his accountant and attorneys of which Gross and his attorneys and accountants availed themselves.

45. Deny each and every allegation of Paragraph "77", except admit that said Agreement speaks for itself.

46. Deny knowledge or information sufficient to form a belief as to each and every allegation of Paragraphs "79", "80", and "81", except deny that Gross was a successful "trader" while in the employ of Newburger Loeb.

47. Deny each and every allegation of Paragraph "85", except admit that the claim referred to therein purports to be brought pursuant to and under the statutory provisions cited in said Paragraph.

SECOND DEFENSE

48. Each of the counterclaims alleged fails to state a claim upon which relief can be granted.

THIRD DEFENSE

49. This Court lacks jurisdiction as to the subject matter of each of the alleged counterclaims and as to each of the additional defendants on counterclaim named herein.

FOURTH DEFENSE

50. Venue with respect to the claims set forth against the additional defendants on counterclaims is not properly laid in the Southern District of New York.

FIFTH DEFENSE

51. Jeanne Donoghue is not properly brought in as a party to this action and has no standing to participate as a party in this action.

SIXTH DEFENSE

52. The grievances set forth in the counterclaims should be and are required to be submitted to arbitration before the New York Stock Exchange and the prosecution of said claims in this action should be stayed pending arbitration.

SEVENTH DEFENSE

53. The claims for relief asserted in said counterclaims are barred by waiver, laches and estoppel.

EIGHTH DEFENSE

54. To the extent that any claim, or any portion thereof set forth in the complaint to this action may be deemed to be time barred by the statute of limitations such claim or portion thereof is pleaded by way of offset to the counterclaims set forth herein.

NINTH DEFENSE, OFFSET
AND FIRST COUNTERCLAIM

55. On or about January 1, 1969, defendant CHARLES GROSS entered into an agreement in writing (the "Partnership Agreement") wherein and whereby the parties thereto agreed to conduct a general brokerage business in securities and commodities under the firm name and style of Newburger, Loeb & Co. (the "Partnership") upon the terms and conditions set forth therein.

56. Thereafter, from time to time, the Partnership Agreement was amended, the Partnership Agreement as amended hereinafter called the "Amended Partnership Agreement." During the period of time that defendant Gross was a partner in the Partnership in addition to the specific obligations and responsibilities set forth in the Partnership Agreement certain of which are set forth hereinafter, he also owed a fiduciary duty toward his other partners to act fairly, openly and honestly toward them.

57. Paragraph 1.2 of the Partnership Agreement and the Amended Partnership Agreement named defendant CHARLES GROSS as a general partner in the Partnership.

58. Paragraph 4.2 of the Partnership Agreement and the Amended Partnership Agreement provided in part that

> "The General Partners as among themselves shall be governed by the following rules of conduct:
>
> (a) Each General Partner shall:
>
> (2) Exercise his best efforts in furtherance of the Firm business;
>
> (3) Conform to the rules of those Exchanges to which the Firm belongs or on which they deal through a partner (in case of conflict, the rules of the New York Stock Exchange shall govern); and
>
> (4) Exercise due care in the performance of his activities for the Firm....
>
> (b) No General Partner shall:
>
> (2) Wilfully do any act adverse to the interest of the Firm;
>
> (3) Except as provided in paragraph 4.4, make any investment for the Firm account or enter into any syndicate..."

59. Paragraph 4.3 ofthe Partnership Agreement and the Amended Partnership Agreement provided, in part, that:

> "Leo Stern, Robert L. Newburger, Andrew M. Newburger, Robert L. Stern and Charles H. Gross are constituted an Executive Committee of the General Partners, which Committee by affirmative vote of a majority of its members shall have full power and authority on behalf of all of the partners of this Firm at any time and from time to time, to manage the affairs and business of the partnership to the exclusion of the then General Partnership, except where these Articles or the rules and regulations of any Securities Exchange of which the partnership is a member shall require otherwise."

60. Paragraph 4.4 of the Agreement provided that;

> "The Executive Committee designated in paragraph 4.3 or its designee or designees, is further authorized and empowered to make investments for the partnership and to enter into syndicates on behalf of the partnership in connection with any matter, thing or venture which they in their discretion deem proper."

61. Between on or about October 7, 1969, and on or about April 28, 1970, defendant GROSS breached the Partnership Agreement and the Amended Partnership Agreement, and further in violation of his fiduciary obligations to the Partnership purchased 39,100 shares of the common stock in City Investing Corp. for and on behalf of the Partnership and further engaged in transactions on behalf of the Partnership in warrants of Tyco Laboratories Inc. and possibly other securities the identity of which is unknown to plaintiff and additional defendants on counterclaim.

62. Said purchases and transactions were made without designation, permission or approval by the Executive Committee of the Firm, and in violation of the explicit provisions of the Partnership Agreement.

63. To conceal and hide the foregoing Gross directed and instructed employees of the Partnership not to record these trades in the regular account for firm investments and to conceal such fact, and the nature and extent of such trades from the other partners of the Partnership.

64. By virtue of the foregoing, the Partnership was damaged in the sum of not less than $148,129.14, no part of which has been paid.

65. Prior to the commencement of this action the foregoing claim was assigned by the Partnership to plaintiff.

TENTH DEFENSE, OFFSET AND
SECOND COUNTERCLAIM

68

66. Repeat and reallege each and every allegation set forth in Paragraphs "55", "56", "57", "58", "59" and "65".

67. During 1969 and 1970 while Gross was managing Partner of the Partnership, to induce the Partnership to go along with his expensive expansionary schemes, Gross did make and cause to be made materially false statements to his partners and others for the purpose of concealing the deperate financial condition in which the Partnership was in. Thus during May, 1969 Gross deliberately and wilfully misrepresented to his partners that the Partnership would earn some $500,000 that year, when in truth and fact the Partnership's 1969 year-end report showed a loss of approximately $1,000,000. Indeed the actual year-end loss for the Partnership for 1969 was actually $300,000 to $400,000 greater with that additional loss not being reflected in the year-end financial statement because Gross deliberately had the firm accountants falsify the 1969 year-end financial statements so that the other partners would not be aware of the true extent of the loss suffered by the Partnership.

68. Gross, on behalf of the Partnership had executed a lease on new space for the Partnership (the "Lease") at One New York Plaza in the County, City and State of New York.

69. Subsequent to the execution of the Lease, it was determined by the Partnership that it was unable, due to severe financial difficulties, to occupy the premises demised pursuant to the Lease.

70. Defendant GROSS, with knowledge of that decision,

and of the severe financial difficulties of the Partnership, received an offer on behalf of the Partnership from the landlord named under the terms of the Lease, wherein and whereby the landlord offered to terminate the Lease and to pay to the Firm the sum of $100,000 for the repurchase of the Lease.

71. In breach of his fiduciary duties to the Partnership and in breach of the Partnership Agreement and the Amended Partnership Agreement, and as part of said plan and scheme defendant GROSS concealed and failed to advise the Partnership of this offer by the landlord under the Lease.

72. By virtue of the foregoing, the Partnership was deprived of said sum of $100,000 and was further compelled to make payment to the landlord of the sum of $430,000 in order to eventually and at a later date "buy out" the Lease, all to the damage of the Partnership in the sum of $530,000.

73. Prior to the commencement of this action the foregoing claim was assigned by the Partnership to Plaintiff.

ELEVENTH DEFENSE, OFFSET AND
THIRD COUNTERCLAIM

74. Repeat and reallege each and every allegation set forth in Paragraphs "55", "5'6", "57", "58", "59", "65", and "67".

75. In further breach of the Partnership Agreement and the Amended Partnership Agreement, defendant GROSS made and caused and permitted the Partnership to make material misrepresentations to the Board of Governors of the New York Stock Exchange wherein false and untrue answers were given to Special

Operations Questionnaires sent by the New York Stock Exchange. Furthermore while the managing partner of the Partnership for the period from April, 1970 through August 11, 1970 he caused the Partnership to be in violation of Exchange Segregation Rule 402 and Section 8 of the Securities Exchange Act of 1934 and Rule 8c-1 promulgated thereunder in that customers' fully paid for securities were pledged without the consent of said customers as collateral for bank loans for the Partnership.

76. By reason of the foregoing the Partnership did incur adverse and unfavorable publicity by reason of the foregoing and was required to and in fact did pay fines and penalties to the New York Stock Exchange by reason of and on behalf of the defendant Gross in the amount of $50,000 and was damaged in an amount of not less than $50,000.

77. Prior to the commencement of this action, the foregoing claim was assigned by the Partnership to Plaintiff.

TWELFTH DEFENSE, OFFSET AND
FOURTH COUNTERCLAIM

78. Repeat and reallege each and every allegation set forth in Paragraphs "55", "56", "57", "58", "59", "65" and "67".

79. Defendant GROSS, as managing partner of the Partaership, set salaries for various employees of the Partnership from time to time.

80. In breach of the Partnership Agreement and the Amended Partnership Agreement, and in violation of his fiduciary duties to the Partnership defendant GROSS caused wasteful payments to be made as purported salary to MABEL BLEICH.

81. Said payments were made, not for sufficient or adequate value received by the Partnership for the services of MABEL BLEICH, but as and for the acquittal of a personal responsibility and as a favor by Defendant GROSS.

82. By virtue of the foregoing, the Partnership was damaged in the sum of $20,000.

83. Prior to the commencement of this action, the foregoing claim was assigned by the Partnership to Plaintiff.

THIRTEENTH DEFENSE, OFFSET AND FIFTH COUNTERCLAIM

84. Repeats and realleges each and every allegation set forth in Paragraphs "55", "56", "57", "58", "59", "65" and "67".

85. Defendant GROSS has failed and refuses to make repayment to the Firm of a $500 "petty cash" advance and of $1,600 in insurance premiums for his sole and exclusive benefit, and of other various and divers items such as an expensive leased automobile, garage fees and the like, by reason of which the Partnership was damaged in an amount not less than $3,000.

86. Prior to the commencement of this action, the foregoing claim was assigned by the Partnership to Plaintiff.

FOURTEENTH DEFENSE, OFFSET AND SIXTH COUNTERCLAIM

87. Repeats and realleges each and every allegation set forth in Paragraphs "55", "56", "57", "58", "59", "65" and "67".

88. Prior to March, 1970, defendant GROSS recommended to the Executive Committee of the Partnership that the Partnership enter into a joint venture with one LOUIS BRACKER in the brokerage business.

89. Thereafter, on the basis of such recommendation, the Firm entered into said joint venture.

90. In breach of the Partnership Agreement and the Amended Partnership Agreement, and further in breach of his fiduciary duties to the Partnership defendant GROSS failed and omitted to state to the Partnership or to its Executive Committee that he had been warned that BRACKER was not a person of good character or reputation in connection with his business dealings, or that the Partnership would be likely to experience difficulties with BRACKER in the event it entered into a business relationship with him.

91. By virtue of the foregoing, the Partnership was damaged in the sum of $60,000.

92. Prior to the commencement of this action, the foregoing claim was assigned by the Partnership to plaintiff.

FIFTEENTH DEFENSE, OFFSET AND COUNTERCLAIM AS TO JEANNE DONOGHUE

93. Plaintiff repeats and realleges each and every allegation of the original complaint with the same force and effect as if fully set forth hereat with the variation and addition that as to all material allegations made therein as to defendant, Mabel Bleich said allegations shall also be deemed to apply to Jeanne Donoghue as if her name had been inserted

in place and in stead of said Mabel Bleich.

SIXTEENTH DEFENSE

94. To the extent that any claim is alleged by plaintiff herein and was obtained by transfer or assignment from the Partnership, to the extent such transfer is held invalid as to any such claim or claims, such claim or claims is asserted on behalf of the Partnership itself.

WHEREFORE, Plaintiff prays for judgment dismissing each of the additional counterclaims as to it and further prays for judgment on the counterclaims alleged by it against defendant, CHARLES GROSS, in this response as follows:

$148,129.14 with respect to the first counterclaim;

$530,000.00 with respect to the second counterclaim;

$ 50,000.00 with respect to the third counterclaim;

$ 20,000.00 with respect to the fourth counterclaim;

3,000.00 with respect to the fifth counterclaim; and

$ 60,000.00 with respect to the sixth counterclaim;

The additional defendants on counterclaim demand judgment dismissing each of the claims alleged by the defendants Charles Gross, Mabel Bleich and Jeanne Donoghue in their counterclaim as to said additional defendants on counterclaim, together with their costs and disbursements.

Respectfully submitted,

FINLEY, KUMBLE, UNDERBERG, PERSKY, ROTH & GRUTMAN
Attorneys for Plaintiff and Additional Defendants on Counterclaim, Alex Aixala, Lawrence J. Berkowitz, Fred Kayne, Robert Muh, Paul D. Risher, and Charles S. Sloane, 477 Madison Avenue
New York, N.Y. 10022

By Herbert F. Roth
Herbert F. Roth
a member of the Firm

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HART & HUME
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10 East 40th Street
New York, N.Y. 10016

Dated: New York, New York

December 26, 1973

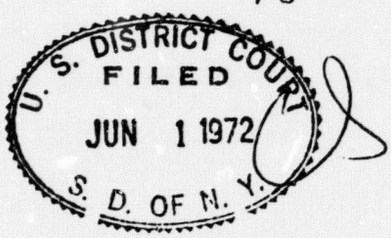
NOTICE OF MOTION FOR SUMMARY JUDGMENT

AND

PARTIAL SUMMARY JUDGMENT

MEMO. ENDORSED

75



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY KUMBLE, UNDERBERG, PERSKY & ROTh, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional defendants on Counterclaims.

----------X

71 Civ. 685

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

S I R S:

PLEASE TAKE NOTICE that, on June 6, 1972 at 10:00 A.M. or as soon thereafter as counsel can be heard, at Room 506, United States Courthouse, Foley Square, New York City, New York, defendants will move the court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure an order granting summary judgment and partial summary judgment as follows:

(1) Summary judgment dismissing the complaint.

(2) Partial summary judgment dismissing such portion of the complaint as is barred by the statute of limitations.

(39)

(3) Partial summary judgment on the first and second counterclaims as follows: setting aside and declaring invalid a certain agreement purportedly made February 11, 1971 by and between Newburger, Loeb & Co., a partnership and Newburger, Loeb & Co., Inc., which agreement is dated as of December 31, 1970; awarding immediate partial judgment to defendants Gross, Bleich and Donoghue in the respective amounts of $129,561, $75,000 and $75,000, all plus interest; directing an accounting of Gross' capital interest as at December 31, 1970; directing an accounting in favor of defendants Gross, Bleich and Donoghue to determine the profits wrongfully realized by plaintiff and by the additional defendants on counterclaims out of their capital; directing return by plaintiff corporation to Newburger, Loeb & Co. of all of the assets of said partnership transferred to said corporation under color of the agreement made February 11, 1971; directing a judicial dissolution of Newburger, Loeb & Co.; appointing a judicial receiver of the assets of plaintiff corporation and of Newburger, Loeb & Co., an additional defendant, on counterclaims in connection with the foregoing remedies.

(4) Partial summary judgment on the fifth counterclaim as follows: awarding to Mabel Bleich judgment in the amount of $75,000, plus interest pursuant to agreement from January 1, 1971.

(5) Partial summary judgment on the sixth counterclaim as follows: awarding to Jeanne Donoghue judgment in the amount of $75,000, plus interest pursuant to agreement from January 1, 1971;

(6) Partial summary judgment on the seventh counterclaim as follows: awarding to Charles Gross judgment in the amount of $129,561, together with an order directing an accounting to determine the balance of his capital interest in Newburger, Loeb & Co.

as of December 31, 1970.

(7) Summary judgment on the third counterclaim in favor of Charles Gross adjudging that plaintiff and each of the defendants on counterclaims have converted the following property owned by Charles Gross, to wit, warrants to purchase 1,650 shares of Geon, Inc., warrants to purchase 2,578 shares of Host Enterprises, Inc., warrants to purchase 3,094 shares of National CSS Inc. and 92 shares of Computer Productions, Inc., and directing plaintiff and said additional defendants on counterclaims to give over to Gross such property still in the possession of any of them, and to pay to Gross the present value of such property disposed of by them, including the sum of $51,207.75.

This motion is made upon the following papers and documents: all the pleadings had and filed herein, the affidavit of Charles Gross, sworn to the 25th day of May, 1972, and exhibits thereto, the affidavit of Saul G. Berkowitz, sworn to the 24th day of May, 1972, and exhibits thereto, the affidavit of Charles R. Jordon, sworn to the 24th day of May, 1972, and the affidavit of Arthur C. Silverman, sworn to the 25th day of May, 1972, and exhibits thereto; the following depositions: David Buckley, Robert S. Persky, Leo Stern and Lawrence J. Berkowitz; the following documents, marked for identification during the depositions: exhibits numbered "1", "2", "3", "4", "5", "17", "18A", "30", "32", "36", "48", "49" and "53".

The ground of this motion is that there is no genuine issue as to any material fact relating to summary judgment and

partial summary judgment specified above, and that defendants are entitled to such judgment as a matter of law.

Dated: May 26th, 1972.

Philip Mandel

Philip Mandel
of
GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants
Charles Gross, Mabel Bleich,
Jeanne Donoghue, Gross & Co.
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TO:

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HART & HUME
Attorneys for Defendants on Counterclaims, Robert S. Persky and Finley, Kumble, Underberg, Persky & Roth
10 East 40th Street
New York, N.Y. 10016

STATEMENT PURSUANT TO RULE 9G

Defendants contend that there is no genuine issue to be tried as to the following material facts:

1. Effective January 1, 1969, Charles Gross became a general partner, and Mabel Bleich and Jeanne Donoghue became limited partners, of Newburger, Loeb & Co., a New York partnership engaged in the stock brokerage business.

2. Between 1962 and January 1969, Gross, Bleich and Donoghue were partners in Gross & Co., which was also a stock brokerage firm and which "cleared" its accounts through Newburger, Loeb & Co. during said period.

3. In February of 1970, the partners of Newburger, Loeb & Co. signed a certain agreement (hereinafter called the "Limited Partnership Agreement") and the Limited Partnership Agreement was not thereafter released or amended by Gross, Bleich or Donoghue.

4. Gross gave notice, effective September 30, 1970 of his withdrawal from the partnership of Newburger, Loeb & Co. pursuant to the Limited Partnership Agreement. Under the terms of the Limited Partnership Agreement, Gross continued to share in profits and losses of the firm, under a changed formula, for the entire calendar year of 1970, and 85% of his capital was to remain in the firm as partnership capital for 12 months after the effective date of the notice of withdrawal.

5. Bleich and Donoghue gave notice of withdrawal from the partnership on December 31, 1970, effective June 30,

1971. It is not disputed that the partnership capital of Bleich and Donoghue as of December 31, 1970 was $75,000 each, plus interest as provided in the Limited Partnership Agreement.

6. The amount of the partnership capital of Charles Gross as of December 31, 1970 is the subject of dispute. The partnership books and records show his capital at that date as the amount of $129,561. This sum appears in a financial statement prepared by Peat, Marwick, Mitchell & Co., the accountants for the partnership, pursuant to instructions and information given by adverse partners. Gross claims that the amount actually owed to him is very much higher, but on this motion seeks to recover $129,561, plus interest pursuant to the Limited Partnership Agreement, reserving for future determination the balance of his claim.

7. As of December 31, 1970, most of the other general partners and general partners in the process of withdrawal had large capital deficits, as shown by the Peat, Marwick, Mitchell statement. Such capital deficits of the active general partners alone aggregated about $1,300,000. The reason Gross had a "plus capital position", when most of the other partners had capital deficits, is that he had invested in the firm $485,000 in addition to his mandatory capital contribution of $412,500, as required by the Limited Partnership Agreement.

8. By the summer and fall of 1970, Newburger, Loeb & Co.'s capital position was troublesome by reason of losses suffered by the firm, and it began to seem possible that the firm could not continue unless it acquired new capital.

9. Kayne, one of the general partners, became managing partner on August 11, 1970 and the partners brought in Risher and Muh as consultants to supervise and improve the operations of the business.

10. As early as September 1970, Risher, Kayne and Muh recognized that there might be an opportunity for them to acquire control of the business of Newburger, Loeb & Co. on terms desirable to them.

11. By November or December, Risher and Muh were de facto managing the business of the firm.

12. Risher, Kayne and Muh brought in an attorney, Lawrence Berkowitz, from California to be in-house counsel to Newburger, Loeb & Co.

13. During the fall of 1970, Robert S. Persky represented Newburger Loeb & Co. in various matters as attorney and then became general counsel to Newburger, Loeb & Co. Persky also represented Risher, Kayne and Muh and certain others who were the promoters of a new corporation which they intended to form, and which in fact they formed later under the name of Newburger, Loeb & Co., Inc., which corporation is the Plaintiff in this action.

14. In the fall of 1970, negotiations commenced which ultimately lead to the execution on February 11, 1971 of an agreement dated as of December 31, 1970, hereinafter referred to as the "Transfer Agreement".

15. Certain of [illegible] active general partners demanded and negotiated for forgiveness of a portion of their indebtedness as a condition of their willingness to approve the proposed Transfer Agreement on behalf of the partnership. Of the 11 general partners who signed on behalf of the partnership, 9 had capital deficits, and under the terms of the Transfer Agreement each received forgiveness of all or part of his indebtedness, the total of such forgiveness to such partners amounting to about $500,000.

16. Under the terms of the Transfer Agreement (Schedule F), the following persons were permitted to purchase voting common stock at 5¢ per share in the amounts set opposite their respective names:

Name	No. of Shares
Paul Risher	200,000
Robert Muh	200,000
Fred [illegible]ayne	200,000
William McGovern	4,000
Richard Stern	30,000
Lawrence Berkowitz	35,000
Charles Sloane	50,000
Robert L. Newburger	55,000

The aforementioned 5¢ stock was the "insider" stock, and under the capitalization provided in the Transfer Agreement would get the bulk of the profits in the event of prosperity of the corporation. The right to purchase this 5¢ stock was regarded as a valuable opportunity during the negotiations. Some of the purchasers were partners who consented to the Transfer Agreement.

17. The "new money" in the proposed new corporation was to come in the form of a deposit of stock by Aixala

as capital of the new corporation pursuant to Rules of the New York Stock Exchange. Aixala was a client of Persky.

18. By December of 1970 it was apparent that the proposed transfer of the business to the new corporation could not be accomplished if Gross, Bleich and Donoghue had to be paid out the amount of their respective capitals. The corporation would not have sufficient cash or capital to carry out its business if Gross, Bleich and Donoghue were paid out in full. Furthermore, it was possible that the New York Stock Exchange would not approve the capital structure of the corporation after such a diminution of its capital. Furthermore, other persons whose consent was deemed necessary for the proposed Transfer Agreement would not go along with the plan to delay and subordinate their claims if Gross, Bleich and Donoghue were paid in full.

19. In December of 1970 Persky conceived of a plan to utilize a pending partnership arbitration against Buckley in connection with the negotiations to get Gross, Bleich and Donoghue to approve the transfer plan.

20. During the period 1962 through 1966, Buckley had an account with Gross & Co. which cleared through Newburger, Loeb & Co. Under the clearing arrangement, Newburger, Loeb & Co. executed Buckley's transactions on the Stock Exchange, mailed him confirmations, mailed him monthly statements, billed him for monies owed, held his funds and securities, lent him money on margin, paid out monies or delivered securities to Buckley when required, received payment for commissions, and shared the commissions with Gross & Co. pursuant to arrangement.

21. Statements and confirmations to Buckley were sent on Newburger, Loeb & Co. letterhead, but they also disclosed that the account was "by arrangement with Gross & Co." or 'by courtesy of Gross & Co.". Newburger, Loeb & Co. sent Buckley the letter marked Exhibit 17 for identification, saying his account has "... the same standing as any account which has been opened by one of our own representatives."

22. The customers man on the Buckley account was Charles Jordon, a partner in Gross & Co. Gross, Bleich and Donoghue had no significant contact with Buckley.

23. The graph and chart attached as Exhibits A and B, respectively (App. 138-139) to the affidavit of Saul G. Berkowitz accurately reflect the transactions in the Buckley account as taken from the monthly statements furnished to Buckley by Newburger, Loeb & Co. (Ex. 18a, App. 170-526). (Saul G. Berkowitz is an accountant having no connection with Lawrence J. Berkowitz, an additional defendant on counter-claims. The similarity of names is an unremarkable coincidence.)

24. The Buckley account came into a state of margin deficit when the S.E.C. halted trading in Westec on August 26, 1966. From April 1962, when the Buckley account was opened, the following facts from the Berkowitz affidavit are correct:

> "From June, 1963 through March, 1964 the account was in a profit position reaching a peak in December, 1963 of profit of approximately $374,000.
>
> "Between March and June, 1964 the account moved into a loss position, and stayed in a loss position until sometime between September and December, 1965. During this period the

"greatest loss was at September of 1965, at which time the loss was about $123,000. After that date the account moved back to a profit position and stayed in a profit position until trading was suspended in Westec. In March, 1966 the profit was about $353,000. If the account had been sold out in full the day before trading was suspended in Westec, the account would have shown a profit of $120,000 since its inception."

25. Buckley never gave any discretionary powers to Jordon or anyone else at Gross & Co. Buckley approved in advance every transaction made in his account.

26. Buckley received the usual confirmations and statements from Newburger, Loeb & Co.; he kept his own stock records, and knew at all times what he owned. He followed his stocks in the newspapers daily. Buckley did his own tax return each year and calculated all his stock transactions item by item, and his records enabled him to do this without difficulty. He made his own rough personal balance sheets periodically.

27. Buckley wanted stock market gains and it made no difference to him whether they were long or short term gains. He knew he was speculating and he intended to speculate. He invested in puts and calls to increase his leverage. When he had numerous gains in high fliers like Syntex and Westec (over $500,000 at times), he took advantage of the buying power created under the margin rules by these increases in the value of the account.

28. Before Buckley opened his account with Gross & Co., he had three other brokerage accounts, one of them being with Merrill, Lynch & Co. While Buckley had his account with Gross & Co., he had another account with Merrill Lynch.

29. Buckley did not rely exclusively on Jordon for market advice. He consulted three personal friends in the financial community. One was a friend with Merrill Lynch in Newark. Another was a friend with Falkner, Dawkins & Sullivan. The third was Dick Clancey with the investment advisory firm of Nelson Schaenen. Buckley subscribed to two investment advisory services and read Forbes and Fortune.

30. When Buckley's Westec stock was worth more than one-half million dollars, Buckley met with Hall, the President of Westec, so that he could get a personal impression of him.

31. Buckley was familiar with price earnings ratios and balance sheets.

32. Buckley had a Bachelor's and Master's Degree from Cornell University, both in the business fields. During the years in question he was a responsible executive of Lever Brothers, serving first as national product manager for Lux toilet soap and later as merchandise manager. He had the primary responsibility for sales, market research, expenses and financial return of Lux toilet soap. His skill during these years was recognized shortly thereafter when he was made Marketing Vice President of Lever Brothers.

33. Buckley came from a "well-off" family. His father was a key man in the Georgia-Pacific Corporation. During the years in question Buckley's father was giving gifts of at least $25,000 per annum to Buckley and his family.

34. Trading in Westec was suspended on August 26, 1966, and thereafter facts emerged in the financial community and in the courts as follows: Williams and Hall, Chairman of the Board and President, respectively, received jail sentences for market fraud. In conjunction with numerous conspirators they manipulated the market of Westec over a period of time by misstating earnings, planting false news in the rumor mills, engaging in disguised insider trading and providing buyers to support the stock at an artificial level. We ask the court to take notice of the facts set forth in Carpenter v. Hall, 311 F. Supp. 1099, 1111; Wyndham Associates v. Bintliff, 398 F. 2d 614 and in In re Westec Corp., 307 F. Supp. 559.

35. The collapse of Westec in the Buckley account required liquidation of his other securities under the margin rules. After such liquidations were accomplished in October 1966, the net debit in the Buckley account amounted to $289,782 and the only asset was 11,300 shares of the frozen Westec stock.

36. In May 1969 Westec was reinstated for trading, at which time it was 11 3/4, but Leo Stern, the responsible partner in Newburger, Loeb & Co., decided not to sell out the stock at that time, and the stock later declined, causing damage as set forth in the set-off claimed by Buckley in the arbitration discussed below. Gross, Bleich and Donoghue were in no way responsible for Stern's failure to sell the stock.

37. In 1970 Newburger, Loeb & Co. commenced an arbitration against Buckley for the amount of his debit balance, and Buckley counterclaimed in the arbitration. The claims and

counterclaims in the arbitration are as set forth in Exhibits 1 through 3 for identification (App. 147-155).

38. Prior to December 1970, Buckley did not assert any claim in the arbitration or anywhere else against Gross, Jordon, Bleich, Donoghue or any other partner in Gross & Co.

39. Prior to the assertion of this counterclaim, Buckley had never complained to Jordon, or Gross, or anybody else in Gross & Co. concerning the handling of his account by Jordon and Gross & Co.

40. In 1969 Buckley opened an account with Jordon at Scheinman, Hochstein & Trotta, where Jordon was then a customers man.

41. Buckley had never complained to Leo Stern concerning the handling of his account by Gross & Co. and Jordon, even though Stern had been dunning him for years to pay up the debit balance.

42. Buckley made a settlement offer in connection with the arbitration as follows: Buckley claimed he could not pay the debit balance of his account, but that his father would contribute $50,000 in cash and Buckley would release all his claim to the securities still in the account if Newburger, Loeb & Co. would release him from the balance of his indebtedness. Newburger, Loeb & Co. refused to accept Buckley's settlement offer.

43. Some time in the fall of 1970, Persky and his law firm took over representation of Newburger, Loeb & Co. in the Buckley arbitration. The same settlement offer was proffered to Persky and Persky was convinced that this was as far as the Buckleys would go and that it would be wise to accept the settlement.

44. In December of 1970 the negotiations regarding the Transfer Agreement were coming to a climax and Persky conceived the idea of using the Buckley situation as a means of pressure against Gross to get Gross to consent to the Transfer Agreement. After the details of the settlement with Buckley had been worked out, Persky made it a condition of the settlement that Buckley assign a claim against Gross & Co. to Newburger, Loeb & Co. Buckley had never previously asserted such a claim, but his lawyers readily consented to the assignment.

45. The assignment of the Buckley claim to Newburger, Loeb & Co. was an "extra". Buckley asked for no additional consideration or no reduction of the consideration he was paying to Newburger, Loeb & Co. in connection with the settlement.

46. Later the Buckley claim was assigned by the partnership to Newburger, Loeb & Co., Inc. under the Transfer Agreement, also as an "extra". This asset was thrown into the pot without any increase or change in the price, previously agreed upon, to be paid by the corporation to the partnership.

47. At the time Persky negotiated the Buckley settlement on behalf of Newburger, Loeb & Co., Gross was a

partner in the process of withdrawal from that firm, and Bleich and Donoghue were full limited partners in that firm, and Persky was aware of their status. Persky obtained the approval of the partnership to make the Buckley settlement on the terms worked out by him, but he did not inform Gross, Bleich or Donoghue of his plan to get an assignment from Buckley of a claim against Gross & Co.

48. In January 1971 the negotiations regarding the Transfer Agreement continued and Gross, Bleich and Donoghue continued their objections to the plan.

49. On February 5, 1971, at a negotiating meeting, Persky handed to Arthur C. Silverman, Esq., an attorney representing Bleich and Donoghue, a complaint Persky had prepared, dated February 4, 1971, together with an unsigned summons, which summons and complaint are attached as Exhibit A to the affidavit of Arthur Silverman (App 117-126). On handing the complaint to Silverman, Persky said in substance and effect: You don't think Gross will get his money if the deal goes through without him, do you?

50. Gross, Bleich and Donoghue refused to consent to the terms of the Transfer Agreement, and on February 11, 1971 the Transfer Agreement was signed without them, and the assets of the partnership were turned over to the corporation.

51. At the time the Transfer Agreement was signed, Bleich and Donoghue had full status as limited partners, Gross was a general partner in the process of retiring, and certain other partners, or partners in withdrawal, also did not sign.

52. Under the terms of the Transfer Agreement as drafted prior to February 11, 1971, it was required that the partnership's attorney furnish an opinion satisfactory to the attorneys for the corporation that the Agreement was duly authorized on behalf of the partnership. It was contemplated that the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil would render this opinion on behalf of the partnership. On the closing date the Rosenman firm refused to render such opinion.

53. Persky was the attorney representing the new corporation, as the acquirer, at the closing of the Transfer Agreement. When the Rosenman firm would not render the opinion that the Agreement was duly authorized by the partnership, Persky assumed a dual role and acted as special counsel for the partnership to render such an opinion to his client, the corporation.

54. Upon execution of the Transfer Agreement, all of the assets and the property of the partnership were delivered to the corporation, which has treated them as its own from that day on. Included among such assets were the capital equities of Gross, Bleich and Donoghue.

55. Under the Transfer Agreement, Newburger, Loeb & Co., Inc. (Plaintiff) assumed all obligations of Newburger, Loeb & Co. to Gross, Bleich and Donoghue on February 11, 1971.

56. Under color of the Buckley claim, Plaintiff has failed and refused to pay to Gross, Bleich and Donoghue any portions of their respective capitals or other claims with regard to the property formerly held in the name of Newburger,Loeb & Co.

57. On August 11, 1970, the Newburger Loeb partnership transferred to Gross vested ownership in the following securities then owned by the partnership:

92 shares of Computer Programs, Inc.
3,094 warrants of Computer Software Systems, Inc.
1,650 warrants of Geon Industries, Inc.
2,578 warrants of Post Enterprises, Inc.

(hereinafter referred to, collectively, as the "in kind" securities).

58. After transfer of the "in kind" securities to Gross, the partnership retained the same in partnership name for purposes of convenience.

59. Upon execution of the Transfer Agreement, the partnership signed over Gross' "in kind" securities to the corporation, which has since sold some and retains the balance under claim of right.

60. The corporation has disposed of Gross' Geon warrants, realizing a profit of about $40,000 in connection therewith.

61. The present value of Gross' Geon warrants would be $51,207.75.

Respectfully submitted,

GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants

By _____
Philip Mandel, a Member of the Firm

AFFIDAVITS IN SUPPORT OF MOTION:

Gross, Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

71 Civ. Action 685

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

AFFIDAVIT

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional defendants on Counterclaims.

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STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

CHARLES GROSS, being duly sworn, deposes and says:

I am a defendant in this matter and make this affidavit in support of a motion for summary judgment dismissing the complaint, and summary judgment in my favor upon some of the counterclaims and partial summary judgment on others.

On January 1, 1969 I became a general partner in Newburger, Loeb & Co. On the same date Mabel Bleich and my sister, Jeanne Donoghue, became limited partners in Newburger, Loeb & Co. The articles of limited partnership were revised for the last time as of February 26, 1970, and said agreement (hereinafter referred to as the "Limited Partnership Agreement") governed the relationship of the partners of Newburger, Loeb & Co. at all relevant times; copy attached hereto as Exhibit C.

Under the Limited Partnership Agreement, I was required to invest and did invest mandatory capital in the amount of $412,500. I also invested additional capital under the terms of the partnership agreement in the amount of $485,000. I was a member of the executive committee of Newburger, Loeb & Co. and I was designated as the managing partner in July of 1969. In August of 1970 I resigned as managing partner, and shortly thereafter I gave notice, to be effective September 30, 1970, of my withdrawal from the partnership. Under the partnership agreement a withdrawing partner and his capital remained tied to the firm for a period after the so-called "effective date" of withdrawal. The withdrawing partner continued to share in profits and losses, but under a changed formula, until the end of the calendar year, and the bulk of the capital of the withdrawing partner continued to remain as partnership capital for a twelve-month period following the effective date of the notice of withdrawal.

By December of 1970 it came to my attention that the remaining general partners of Newburger, Loeb & Co. were working out a plan to sell the assets and the business to a new corporation and were soliciting consents thereto from the various general and limited partners and subordinated lenders. The plan required transfer to the new corporation of the cash and capital of the partnership. Thus, under the plan limited partners and partners having capital surpluses would take securities of the corporation instead of cash. Partners having capital deficits (and this group constituted almost all of the remaining general partners) would be granted substantial forgiveness of their indebtedness, and an extension of time to pay the balance over to the new corporation.

Being one partner with a substantial capital credit, I was not in favor of this plan. In January of 1971 there were negotiations between the representatives of the various factions in an effort to work out a mutually agreeable basis upon which I and Mrs. Donoghue and Mabel Bleich would approve the plan. One of the "bones of contention" involved the amount of my capital balance with the firm. During these negotiations, two sets of financial statements were employed, both unaudited, prepared by the faction then in control of the partnership: an unaudited balance sheet as at October 31, 1970 and an unaudited balance sheet as at November 27, 1970. Based on these balance sheets, estimates of my capital position were made by me and the representatives of the general partnership. The representatives of the partnership and the proposed corporation argued that my balance

was only about $170,000. My estimate was much higher. It was acknowledged by all that I had a very substantial credit balance, which resulted from the fact that I was one of the few partners who had deposited large additional capital, as stated above, in addition to the mandatory capital.

In the negotiations in January, I stated that I would not approve any plan unless it provided that I would be paid a substantial portion of my capital in cash promptly so that I could recommence business on my own account. Mrs. Donoghue and Miss Bleich also demanded part of their capital in cash, and the negotiations were carried out on the basis that I and Mrs. Donoghue and Miss Bleich could be treated as a unit for negotiating purposes.

The representatives of the partnership and the promoters of the corporation took the position that they could not pay out the dollar amounts we wanted and still have enough capital left to get the approval of the Stock Exchange for the corporation to carry on the partnership business. They also said that if I and Mrs. Donoghue and Miss Bleich persisted in withholding approval, the plan could not come into effect, and the partnership would have to go into receivership or bankruptcy, and everybody's money would be lost entirely. I stated that I would prefer to take my chances with a dissolution or receivership rather than to accept the unfair proposals which were offered to me.

The representatives of the partnership and the corporation also stated that if my approval could not be obtained, they might go ahead with the plan without it, and that they had very serious claims and litigiations, including the Buckley claim, to bring against me to offset my claims for the return of my capital.

My attorney and the attorneys for Mrs. Donoghue and Miss Bleich made it very clear that the partnership had no power or authority to make the proposed agreement without our consent, and that the partners and the new corporation who purported to do so would be performing unlawful acts.

We never reached a mutually acceptable agreement and, upon information and belief, on February 11, 1970, the Transfer Agreement was signed and was immediately put into effect, all without my consent and approval and without the consent and approval of Miss Bleich and Mrs. Donoghue.

From that day to this day, no part of my capital has been returned, nor has any part of the capital of Mrs. Donoghue and Miss Bleich been returned to them. The capital amounts of Mrs. Donoghue and Miss Bleich are $75,000 each, plus interest at the highest rate permitted by the Stock Exchange. In my case the amount of capital is subject to dispute and will have to be settled by an accounting. I believe that the proper sum owed to me is in excess of $400,000. However, at this time I ask only for partial summary judgment awarding me immediately the sum which de-

fendants acknowledge as my capital, which is $129,561.00 plus interest as per the partnership agreement.

The "In Kind" Securities

Plaintiff and third party defendants have also wrongfully converted certain warrants and other securities held in firm name for my individual benefit and not part of my capital account. The circumstances are as follows: During the course of the business of the partnership, while I was a partner, the partnership at various times received certain warrants and securities in connection with underwritings and other transactions. On August 11,1970 the executive committee of the partnership determined to distribute these "in kind" securities to the individual partners in the proportions of their respective interests.

The minutes of the meeting are attached hereto as Exhibit A, reading as follows:

> "1. Assignment of vested interest in 'paper' accumulated since 1/1/69: It was decided that interest in 'paper' is the property of each general partner in relationship to his interest in the profits and losses of the firm at the time the 'paper' was earned not at the time it will be disposed of."

This distribution was confirmed by a letter signed on August 24,1970 by Robert Stern on behalf of the partnership, a copy of which is attached to this affidavit as Exhibit B. For purposes of convenience, the partnership continued to hold the securities in the partnership name for the benefit of the individual distributees, including myself.

My share of the securities listed on Exhibit B was 16-1/2 percent of the total, or:

92 shares of Computer Productions,Inc.
3,094 warrants, Computer Softwear Systems, Inc.
1,650 warrants, Geon Industries, Inc.
2,578 warrants, Host Enterprises, Inc.

Upon execution of the Transfer Agreement, the partnership turned over to the corporation my "in kind" securities. Upon information and belief, the corporation exercised my Geon warrants and then sold the stock, realizing a profit of about $40,000. The present value of my Geon warrants is $51,207.75. I believe I am entitled to summary judgment under the Third Counterclaim in the amount of $51,207.75 with respect to the Geon warrants, and to a judgment directing immediate return to me of my other "in kind" securities.

The Buckley Claim

The allegation in the complaint that I personally handled the Buckley account is totally false. I never took an order from Mr. Buckley, and I never gave him any investment advice either to buy or sell. I never met him and, to the best of my recollection, I only spoke to him on the telephone once.

To the best of my knowledge and belief, no wrong was committed by Mr. Jordan in the handling of the Buckley account. My understanding then, and my understanding now, is that Buckley was a highly educated, sophisticated business

executive from a very wealthy family who wanted to speculate. My understanding then and now is that Buckley controlled the account fully and completely.

In connection with the Buckley account, Gross & Co. was the originating house, and Newburger, Loeb & Co. was the broker of record. Newburger, Loeb & Co. treated the accounts cleared through them the same as Newburger, Loeb & Co.'s other accounts.

Newburger, Loeb & Co. executed the Buckley transactions and prepared the confirmations regarding each transaction. It was the practice of Newburger, Loeb & Co. to have responsible partners review all of the transactions of the day, including the transactions in accounts "by arrangement with Gross & Co." for compliance with Securities Laws and Regulations and Stock Exchan les. Never once did Newburger, Loeb raise any question or make any comment regarding the number of transactions or volume of business in the Buckley account.

At no time until the present date did Mr. Buckley ever make any complaint to me, or anybody else at Gross & Co., concerning this account.

C. L. Gross
CHARLES GROSS

Sworn to before me this
15 day of May ,1972

Frances S. Warner
Notary Public

FRANCES S. WARNER
Notary Public, State of New York
No. 03-4158360
Qualified in Bronx County
Commission Expires March 30, 1973

Exhibit A to Gross Affidavit

Minutes of Executive Committee Meeting of
Newburger, Loeb & Co. of August 11, 1970,

See Defendants' Trial Exhibit JJJJ

Exhibit B to Gross Affidavit

Newburger, Loeb & Co.

SOUND INVESTMENT SERVICE SINCE 1899

1 HANOVER SQUARE, NEW YORK, N.Y. 10004 (212) 944-6300

Branch Offices

4 East 26th Street at 5th Avenue
625 Seventh Avenue at 38th Street
67 West 57th Street at 6th Avenue
1900 Ave. of the Stars, Los Angeles, Calif.
2091 Broadway at 72nd Street
901 Madison Avenue at 74th Street
920 Flatbush Ave. at Church Ave., Brklyn.
110 N Doheny Dr., Beverly Hills, Calif.

Members New York Stock Exchange • American Stock Exchange • Chicago Board of Trade • New York Cotton Exchange • Commodity Exchange • New York Cocoa Exchange

August 24, 1970

To: Mr. Charles H. Gross

The following securities were acquired by Newburger, Loeb & Co. after January 1, 1969 and before February 26, 1970:

555 shares Computer Production, Inc.
18,750 warrants Computer Software Systems, Inc.
~~4,914 warrants Cosmo Credit, Inc.~~
10,000 warrants-Geon Industries, Inc.
15,625 warrants Host Enterprises, Inc.
3,600 warrants Tyco Laboratories, Inc.

The Executive Committee has determined that you therefore own an interest in these securities (which may not be readily transferable or marketable) equivalent to your share as a General Partner in the firm's profits or losses as defined in paragraph 6.3 of the Articles of Limited Partnership as of January 1, 1969.

Very truly yours,

NEWBURGER, LOEB & CO.

By: Robert L. [illegible]

jt: RLS

Exhibit C to Gross Affidavit

Restated articles of limited partnership of Newburger, Loeb & Co., as amended, as of February 26, 1970,

See Defendants' Trial Exhibit "U"

Jordon Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

71 Civ. Action 685

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

AFFIDAVIT

Additional Defendants on Counterclaims.

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STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

CHARLES R JORDON, being duly sworn, deposes and says:

I met David Buckley in 1959 when I was a customers' man in the office of Hayden, Stone & Co. Mr. Buckley was in the habit of coming into our offices during lunch hour and we met in this manner. He opened an account, of which I was the customer's man.

Mr. Buckley was an executive of Lever Brothers and he came from a very wealthy family. His father was a key man and major stockholder of Georgia Pacific Corporation. I knew David Buckley was a highly educated man and I knew he had a number of close friends in various aspects of the securities business, from whom he frequently solicitec information and advice. Because of his background and connections, he always seemed unusually knowledgeable to me concerning things that were going on in various parts of the business world.

I did not have the advantage of the same kind of background that Mr. Buckley had, and I did not have the kind of friends he had. Mr. Buckley and I never became social friends - our only contact was business.

At all times while Mr. Buckley did brokerage business with me, he also had one or more other brokerage accounts, and he got market information from every source he could.

When I moved over and joined Gross & Co. in 1962, I was pleased that Mr. Buckley chose to move his account over with me. Gross & Co. cleared through Newburger, Loeb & Co., which meant, in practice, that I took Mr. Buckley's orders, but they were executed by Newburger, Loeb & Co. and Newburger, Loeb & Co. sent out the confirmations, sent out the monthly statements, held the securities, kept the security records, billed Buckley when appropriate, paid Buckley when appropriate, and was the lender when

Buckley borrowed on margin. Newburger, Loeb was the broker of record and shared the brokerage commissions with Bross Co., and indirectly with me.

Buckley at all times retained absolute control of his account. There was never a single transaction made without Buckley's prior instruction to make it. Mr. Buckley solicited my advice at times, and I believe he respected it. Sometimes I made suggestions and sometimes he made suggestions, but the decision with regard to every transaction was his in fact as well as in form. There was never a time when Buckley rubber-stamped my suggestions. He always considered them independently, and frequently took time to discuss them with his other advisers and friends. When he liked my suggestions, he followed them. Frequently he did not like my suggestions for purchases or sales and turned them down, quite properly, without a qualm. During the years of our association I had every reason to believe that Newburger, Loeb was sending him appropriate confirmations and monthly statements promptly - Buckley was always aware of the status of his account.

Buckley was an aggressive speculator. He had no interest in investing for income. His goal was to realize large trading gains, and with that goal in mind he employed all of the sophisticated tools of leverage. He traded in puts and calls, which he understood thoroughly, and when he had appreciated values in his account, he acted to pyramid these gains by employing the additional margin.

It was my understanding that Buckley felt that his business position and future, and his family position and future, made it appropriate for him to take an aggresive speculative approach to the stock market. It was my understanding that he felt that, in any event, he would be rich eventually, but he wanted to hasten that event by his stock market activities.

Mr. Buckley, to this date, has never brought any action against me. He has never said to me, formally, or informally, that I ever "churned" his account. He never threatened to bring any action against me. In fact, as recently as 1969, three years after the collapse of his account at Newburger, Loeb, Buckley was doing brokerage business with me at Scheinman, Hochstin & Trotta, where I was then employed as a customers' man.

The volume of transactions in Buckley's account was controlled by one thing, and one thing alone - Buckley's decisions as to what transactions should be had and when. During the period of 1962 through 1966, the fortunes of the Buckley account fluctuated but, until the Westec scandal broke, Buckley's fortunes fluctuated far more on the up side than on the down side, and he was very much aware of it. Buckley hit very big winners in Syntex and Westec, and if he had sold out in time, I believe he would have made more than half a million dollars in profit in each of these situations. While these stocks were way up in his account, Buckley did a lot of buying and selling in the hope of multiplying his winnings, but he knew very well indeed that every day he failed

to take a profit he risked losing it as the price for hoping to increase it. I regret that he did not take his profits and get out in time, but I deny that the fault was mine. In any event, Buckley's failure to make sales certainly cannot be attributed to churning on my part.

During the entire time Buckley did business with me, every piece of advice I gave him was honest, and the best of my judgment at the time. My interest was to have the account prosper. Buckley freely took my advice and freely discarded my advice, making the decision in every case himself.

At no time did any representative of Newburger, Loeb & Co. suggest to me that they had any question or concern regarding the volume of transactions in the Buckley account.

I am told that the complaint in this action states that Charles Gross was the customers' man of the Buckley account at Gross & Co. This statement is totally false. I handled the account entirely. I am certain that Gross never took a single order from Buckley. Neither did Mabel Bleich or Jeanne Donoghue.

Charles R. Jordon

CHARLES R. JORDON

Sworn to before me this
24 day of May, 1972.

Frances S. Warner

Notary Public

FRANCES S. WARNER
Notary Public, State of New York
No. 03-4158360
Qualified in Bronx County
Commission Expires March 30, 1973

Silverman Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

71 Civ. 685

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

AFFIDAVIT

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ARTHUR C. SILVERMAN, being duly sworn, deposes and says:

I am an attorney at law admitted to the Bar of the State of New York and a member of the firm of Golenbock & Barell. During the fall of 1970 and the months of January and February, 1971, I represented Jeanne Donoghue and Mabel Bleich in connection with negotiations for a proposed

agreement regarding the transfer of the assets of Newburger, Loeb & Co. to a new corporation.

There was a meeting on February 5,1971 at the offices of my firm, Golenbock & Barell, for the purpose of attempting to reach a mutually satisfactory agreement regarding transfer of the business and assets of Newburger, Loeb & Co. to a proposed new corporation. The meeting was attended by a large number of the interested parties and attorneys.

One of the attorneys present was Robert S. Persky, who represented the promoters of the new corporation and also represented the partnership of Newburger, Loeb & Co., at least in certain matters. Just prior to the commencement of the meeting, Mr. Persky handed me a summons (undated and unsigned) and a complaint signed by him, dated February 4,1971. The complaint was brought in the United States District Court for the Southern District of New York on behalf of Newburger, Loeb & Co., a New York limited partnership, as assignee of David Buckley and Mary Buckley, against Charles Gross and Gross & Co. A copy of this summons and complaint is attached hereto as Exhibit A.

On handing me the complaint, Mr. Persky said to me: "You don't think Charlie and Mabel will get their money without a fight if the deal goes through without them, do you?"

Previously, on February 2,1971, Mr. Persky had

written a letter delivered to me by hand, a copy of which is attached hereto as Exhibit B, in which he stated that unless Miss Bleich would consent to the reorganization on or before 4:00 P.M. Thursday, February 4, 1971, the plans would be cancelled ". . . and in accordance with the request of the New York Stock Exchange, Newburger, Loeb & Co. will be liquidated."

Attached hereto as Exhibits C and D, respectively, are copies of communications, taken from my files, to Jeanne Donoghue and Mabel Bleich, respectively, from Newburger, Loeb & Co., acknowledging that the amount of their capital accounts as of January 28, 1971 was $75,000 each, plus interest of $1,868.75.

Attached hereto as Exhibits E and F, respectively, are copies taken from my files of notices given by Jeanne Donoghue and Mabel Bleich, dated December 31, 1970, of withdrawal as Limited Partners of Newburger, Loeb & Co., effective June 30, 1971.

Arthur C. Silverman

ARTHUR C. SILVERMAN

Sworn to before me this
25th day of May 1972.

Notary Public

FRANCES S. WARNER
Notary Public, State of New York
No. 03-4158360
Qualified in Bronx County
Commission Expires March 30, 1973

Exhibit A.

to

Affidavit of Arthur C. Silverman
verified May 25, 1972..

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

NEWBURGER, LOEB & CO., a New York Limited Partnership, as Assignee of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS and GROSS & CO.,

Defendants.
----------X

PLAINTIFF DEMANDS TRIAL BY JURY

SUMMONS

Index No.

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to serve upon FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, ESQS., plaintiff's attorneys, whose address is 477 Madison Avenue, New York, New York 10022 an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

_____
Clerk of the Court

_____
Deputy Clerk

Dated: New York, New York
February , 1971

[Seal of Court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

NEWBURGER, LOEB & CO., a New York Limited Partnership, as Assignee of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS and GROSS & CO.,

Defendants.

----------X

COMPLAINT

Index No.

Plaintiff, complaining of defendants by its undersigned attorneys, Messrs. FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, alleges:

JURISDICTION

1. This Court's jurisdiction is based upon: Section 22(a) of the Securities Act of 1933, as amended, 15 U.S.C. §77v(a) (the "Securities Act"); Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa (the "Exchange Act"); and the principles of pendent jurisdiction.

2. This action is instituted as the result of defendants' violation of Section 17(a) of the Securities Act; Sections 10(b) and 15(c) of the Exchange Act; the Rules and Regulations of the Securities Exchange Commission (the "SEC") promulgated under both Acts and in particular: Rule 10b-5, 17 C.F.R. 240.10b-5; Rule 15c1-7, 17 C.F.R.

240.15c1-7; the Rules of the National Association of Security Dealers (the "NASD"); and common law principles.

PLAINTIFF

3. Plaintiff Newburger, Loeb & Co., is a Limited Partnership organized and existing under the laws of the State of New York, with its principal place of business at 5 Hanover Square, New York, New York.

4. On or about December 30th, 1970, for good and sufficient consideration, David Buckley and his wife Mary Buckley (the "Buckleys"), then residing at 82 West River Road, Rumson, New Jersey, assigned to the plaintiff all of their claims and causes of action against the defendants herein.

DEFENDANTS

5. Defendant Charles Gross is an individual residing at 32 The Intervale, Roslyn Heights, New York. During all relevant times upon information and belief, he was a partner, agent and employee of defendant Gross & Co.

6. Defendant Gross & Co., upon information and belief, was a partnership organized and existing under the laws of the State of New York. During all relevant times, it was principally engaged as a broker and dealer in securities, transacting business in the City, County and State of New York.

FOR A FIRST CAUSE OF ACTION

7. This first cause of action is instituted under Section 22(a) of the Securities Act to enforce the liability created by Section 17(a) of the Securities Act.

8. During a four and a half (4-1/2) year period between April 1962 and August 1966, the defendants, by the use of the mails and other instruments of transportation or communication in interstate commerce, directly and indirectly engaged in transactions, practices or courses of business, hereinafter more fully set forth, which operated and were calculated to operate as a fraud and deceit upon the Buckleys, in connection with the offer and sale of securities.

9. Between April 1962 and August 1966, the Buckleys maintained a margin account with defendant Gross & Co.

10. During that 4-1/2 year period, defendant Charles Gross was the partner and registered representative of defendant Gross & Co., with which the Buckleys dealt.

11. During that 4-1/2 year period, defendant Charles Gross suggested, encouraged and effected a total of more than 1,100 transactions in the margin account of the Buckleys.

12. Upon information and belief, all of the more than 1,100 transactions effected in the margin account of the Buckleys were made pursuant to the advice of defendant

Charles Gross, the Buckleys relying not only upon the professed knowledge and expertise of defendant Charles Gross in the securities market, but also upon the fiduciary relationship of broker to customer.

13. The total dollar amount of purchases and sales during that 4-1/2 year period was $9,329,557. The average investment by the Buckleys' in the account during that same period was $107,520. Thus, the average investment of the Buckleys' in the account was turned over approximately 40 times.

14. The unusually excessive and, under the circumstances, totally unwarranted heavy trading was not consistent with and was in derogation of defendant's primary duty to advise and encourage sound investment decisions.

15. The unusually excessive and, under the circumstances, totally unwarranted heavy trading in the Buckleys' account was suggested, encouraged and effected primarily for the purpose of generating commissions, which, upon information and belief, were in excess of $75,000.

16. The unusually excessive and, under the circumstances, totally unwarranted heavy trading in the Buckleys' account resulted in net losses to the Buckleys exceeding $174,000.

FOR A SECOND CAUSE OF ACTION

17. This second cause of action is instituted under Section 27 of the Exchange Act, to enforce rights arising out of defendants' violation of Section 10 of the Exchange Act, and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.

18. Plaintiff repeats each and every allegation set forth in paragraphs "8" to "16" with the same force and effect as if the same were hereat fully set forth.

FOR A THIRD CAUSE OF ACTION

19. This third cause of action is instituted under Section 27 of the Exchange Act, to enforce rights arising out of defendants' violation of Section 15(c) of the Exchange Act and Rule 15c1-7 promulgated thereunder, 17 C.F.R. 240.15c1-7.

20. Plaintiff repeats each and every allegation set forth in paragraphs "8" to "16" with the same force and effect as if the same were hereat fully set forth.

FOR A FOURTH CAUSE OF ACTION

21. Plaintiff repeats each and every allegation set forth in paragraphs "8" to "16" with the same force and effect as if the same were hereat set forth in full.

22. Defendants have violated common law duties owed by them to the Buckleys.

FOR A FIFTH CAUSE OF ACTION

23. Plaintiffs repeat each and every allegation set forth in paragraphs "8" to "16" with the same force and effect as if the same were hereat set forth in full.

24. That by reason of the fraudulent conduct and deceit practiced and participated in by the defendants, the acts and practices engaged in by the defendants which constitute violations of the Securities Act, the Exchange Act, and the Rules and Regulations promulgated under both acts, plaintiff has been compelled to and has engaged counsel to prosecute this action against the defendants herein.

25. Plaintiff has been informed and verily believes that the services to be rendered by said counsel could be extensive and may be required over a long period of time, and if not settled will require substantial cash disbursements in the prosecution of this action by reason of the complexity of the transactions in the account of the Buckleys, and will further require extensive examinations before trial and that the fair and reasonable value of the services to be rendered by said counsel in the investigation, preparation and trial of this action will be in excess of $50,000.

WHEREFORE, plaintiff NEWBURGER, LOEB & CO., as assignee of David Buckley and Mary Buckley, respectfully requests judgment as follows:

(a) on the FIRST, SECOND, THIRD and FOURTH CAUSES OF ACTION, money damages as against the defendants Charles Gross and Gross & Co., in excess of $249,000., jointly and severally, or such other measure of recovery for defendants' violations, as the court may deem just and proper;

(b) on the FIFTH CAUSE OF ACTION, money damages as against the defendants, jointly and severally, in excess of $50,000 or such other sum as the court may find just and reasonable as and for plaintiff's counsel fees; and

(c) such other, further and different relief as may be deemed just and proper;

together with interest from the date of the violations or wrongs hereinbefore set forth, with costs and disbursements.

Dated: New York, New York
February 4, 1971

FINLEY, KUMBLE, UNDERBERG,
PERSKY & ROTH

By: _____
ROBERT S. PERSKY
A Member of the Firm
Attorneys for Plaintiff
477 Madison Avenue
New York, New York 10022
212 755-7600

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Exhibit B. to Silverman Affidavit

FINLEY. KUMBLE. UNDERBERG. PERSKY & ROTH

LEON FINLEY
STEVEN J. KUMBLE
NEIL UNDERBERG
ROBERT S. PERSKY
HERBERT F. ROTH
DONALD ZIMMERMAN

LOUIS BECK
NORMAN ROY GRUTMAN
THEODORE J. GREENE
ALAN M. GELB
B. HOWARD RAPPAPORT

RICHARD E. CARTER
PAUL R. ALTER
LEWIS H. SANDLER
STANLEY L. GOLDEN
BENJAMIN IRA GERTZ
JOHN P. A. MARCIN
DONALD S. SNIDER
HOWARD L. BASS
ROBERT E. PEDUZZI

STEPHEN A. WEISS
L. MARTIN GIBBS
MICHAEL A. BAMBERGER
ROBERT L. FALKER
LENORE D. KALMUS
SHELDON M. GOLDSTEIN
WILLIAM F. ROSENBLUM, JR.
PETER J. LANE
STEPHEN G. DICKERMAN

477 MADISON AVENUE
NEW YORK, NEW YORK 10022

755-7600
(AREA CODE 212)

CABLE: LENFINLEY
NEW YORK

February 2, 1971

BY HAND

Gentlemen:

Mabel Bleich has informed us by letter dated February 1, 1971, from her attorneys, Golenbock and Barell, that she has withdrawn from the reorganization of Newburger, Loeb & Co.

Golenbock and Barell, former counsel to Newburger, Loeb & Co., also represent Jeanne G. Donoghue, the sister of Charles Gross and on occasion have represented Charles Gross, as an individual.

Unless we are advised in writing that Miss Bleich will consent to the reorganization on or before 4:00 P.M. on Thursday, February 4, 1971, our plans to close on February 11, 1971, will be cancelled and in accordance with the request of the New York Stock Exchange, Newburger, Loeb & Co., will be liquidated.

We are advising you of these plans at this time so as to permit counsel to schedule other matters on February 11, 1971.

Very truly yours,

FINLEY, KUMBLE, UNDERBERG,
PERSKY & ROTH

By Robert S. Persky
Robert S. Persky

Exhibit C to Silverman Affidavit

Letter from Newburger, Loeb & Co. to Jean Donoghue dated January 28, 1971 setting forth amount of her capital account,

See Defendants' Trial Exhibit AAA

Exhibit D to Silverman Affidavit

Letter from Newburger, Loeb & Co. to Mabel Bleich dated January 28, 1971 setting forth amount of her capital account,

See Defendants' Trial Exhibit AAA

Exhibit E to Silverman Affidavit

Letter dated December 31, 1970 from Jean Donoghue to Newburger, Loeb & Co. withdrawing as limited partner,

See Defendants' Trial Exhibit MM

Exhibit F to Silverman Affidavit

Letter dated December 31, 1970 from Mabel Bleich to Newburger, Loeb & Co. withdrawing as limited partner

See Defendants' Trial Exhibit LL

Berkowitz Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

71 Civ. Action 685

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

AFFIDAVIT

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

- x

STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

SAUL G. BERKOWITZ, being duly sworn, deposes and says:

I am a certified public accountant of the State of New York, associated with the firm of Simonoff, Peyser & Citrin.

The Buckley Account

I, and various members of my firm acting under my supervision, have made an analysis of the transactions in

the Buckley Account with Newburger, Loeb & Co., as shown by the monthly statements of said account during the period April 2,1962 and ending August 25,1966, which monthly statements are marked "Defendants' Exhibit 18AIdentification". On the basis of analysis of the account, I have prepared certain graphs and summaries as follows:

1. Attached hereto as "Exhibit A" is a graph showing the equity in said account as at the end of every quarter and the invested capital in the account as of the same dates. By "equity of the account" I mean the market value of all the securities in the account minus the sum owed to the broker as margin. The market value of the securities at the various respective dates were taken from the Wall Street Journal. By invested capital I mean the total amount of cash and securities deposited into the account by Buckley since the starting date minus the total amount of cash and securities taken out of the account by Buckley since the starting date, without giving account to interest paid or dividends received.

As at any date shown on the graph, the difference between the equity position and the invested capital position indicates the total profit or loss in the account from the starting date.

The value of the equity in the account at any given date is, of course, smaller than the total market value of the securities in the account, because equity is determined by subtracting margin debt from total market value.

Our computations show the following:

From April,1962 through June,1963 profits and losses were relatively small.

From June, 1963 through March, 1964 the account was in a profit position reaching a peak in December,1963 of profit of approximately $374,000.

Between March and June,1964 the account moved into a loss position, and stayed in a loss position until sometime between September and December, 1965. During this period the greatest loss was at September of 1965, at which time the loss was about $123,000. After that date the account moved back to a profit position and stayed in a profit position until trading was suspended in Westec. In March,1966 the profit was about $353,000. If the account had been sold out in full the day before trading was suspended in Westec, the account would have shown a profit of $120,000 since its inception.

2. Attached hereto as "Exhibit B" is a chart showing the ratio of capital turnover to equity during each quarterly period ending from June,1962 through the partial quarter ending on August 25,1966. By capital turnover is meant one purchase and one sale, or the total volume of purchases and sales during the period divided by two. The equity taken was the equity at the end of each period, derived as described above in Exhibit A.

To a significant extent the indicated quantum of turnover is misleading, because there were numerous call transactions in the account, which frequently involved simultaneous purchases and sales at the end of the call period for the purpose of realizing profits on the call transaction or salvaging partial value of the call.

3. We are informed that the complaint in this case alleges that there were a total of 1,110 transactions in the account. Our examination leads us to believe that this figure is inaccurate and misleading. The records give evidence that on many occasions an order was placed for purchase of large round lots such as 1,000 shares. This order in the normal course might be filled by making several purchases of 100 shares and several purchases of 200 or 300 shares. In our opinion such purchases should be regarded as a single transaction, but it is clear this method was not followed in reaching the transaction amount set forth in the complaint. Additionally, we submit that the number of transactions in a trading account is not inherently a useful figure. We believe that 100 transactions in a $10.00 stock do not have more weight than one transaction in a $1,000 stock. In our opinion, only a dollar volume analysis could be meaningful.

4. Our analysis of capital turnover and our observations regarding volume of transactions should not be taken as implying an opinion that there is some appropriate limitation of turnover or ratio in connection with

a speculative trading account. Speculation involves opportunistic purchases and sales and, in our opinion, the appropriate holding period is determined by judgment and market condition regarding each stock, and not by any norm or standard.

Gross' Capital in Newburger, Loeb

We were also employed by Mr. Gross to examine the books and records of Newburger, Loeb & Co. for the purpose of determining Gross' capital account as of December 31,1970. In the course of our examination, the partnership's representatives gave us, and we examined, a statement of the financial condition of Newburger, Loeb & Co. as of December 31,1970 prepared by Peat, Marwick, Mitchell & Co. for the partnership under date of March 25,1971. A copy of Peat, Marwick, Mitchell & Co.'s financial statement is attached hereto as Exhibit C.

Peat, Marwick's statement shows Mr. Gross' capital as $129,561. We believe that this figure was reached as a result of inappropriate and improper write-offs, adjustments and allocations which were determined by the general partners and given to Peat, Marwick as a basis for the statement.

In our opinion Mr. Gross' capital, properly computed, is very much higher than the figure of $129,561 as carried on the books of the partnership.

However, we are informed that the dispute as to the proper figure must await a trial or a judicial accounting and, for the purpose of the instant motion for partial

summary judgment, Mr. Gross' capital must be taken to be the amount of $129,561, as admittedly owed per the books of the partnership and the Peat, Marwick, Mitchell & Co. statement.

Saul G. Berkowitz
SAUL G. BERKOWITZ

Sworn to before me this
24 day of May, 1972.

Frances S. Warner
Notary Public

FRANCES S. WARNER
Notary Public, State of New York
No. 03-4158360
Qualified in Bronx County
Commission Expires March 30, 197

Exhibit A to Berkowitz Affidavit

Graph of equity in Buckley account at the end of every quarter and invested capital in account as of same dates,

See Defendants' Trial Exhibit D

Exhibit B to Berkowitz Affidavit

Chart showing ratio of capital turnover to equity in Buckley account during each quarterly period from June 1962 to August 25, 1966

See Defendants' Trial Exhibit D

Exhibit C to Berkowitz Affidavit

Financial statement prepared by Peat, Marwick, Mitchell & Co. of the partnership Newburger, Loeb & Co. as of December 31, 1970

See Additional Defendant's Finley, Kumble, et al. Trial Exhibiit I

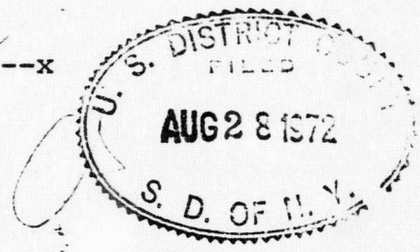
AFFIDAVITS IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT:

Persky Affidavit

JUDGE MC LEAN

135

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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NEWBURGER, LOEB & CO., INC., as assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership and LAWRENCE J. BERKOWITZ,

Additional defendants on Counterclaims.

----------x

71 Civ. 685

AFFIDAVIT IN OPPOSITION TO THE GROSS DEFENDANTS MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ROBERT S. PERSKY, being duly sworn, deposes and says that:

1. I am a member of the law firm of FINLEY, KUMBLE, UNDERBERG, PERSKY, ROTH & GRUTMAN and am admitted to practice in the State of New York and before the United States District Court for the Southern District of New York.

I am one of the additional defendants on counterclaims in the captioned action and make this affidavit in support of the

motion by plaintiff and the additional defendants and in opposition to the motions by defendants Gross, Bleich and Donaghue (the"Gross Defendants").

A. BACKGROUND - THE IMMINENT DESTRUCTION OF NEWBURGER, LOEB & CO.

2. From November 1970 through February 1971, the brokerage firm of Newburger, Loeb & Co., (the "Partnership") a partnership of more than 70 years standing and a member of the New York Stock Exchange ("NYSE") was under formal threat of imminent suspension and liquidation by the NYSE with the consequent destruction of its business and the personal bankruptcy of a substantial number of its members.

Under the aegis of defendant Gross as managing partner, the firm had been brought to the edge of financial ruin with chaotic back office conditions and substantial losses of varied origin substantially augmented by improprieties by Gross outlined in the affidavit of Ned D. Frank submitted herewith.

3. In August 1970 the general partners following discovery of considerable wrongdoing on the part of Gross, had ousted him as managing partner and the struggle to secure the survival of the firm was undertaken.

4. The battle to save the company was finally won by execution of an agreement dated February 11, 1971 whereby the diverse and in many cases diametrically opposed interests of general partners, limited partners, and subordinated lenders of the firm represented by some 17 different firms of attorneys were composed and the business of the firm preserved from de-

struction. A true and correct copy of that agreement is annexed as Exhibit "A".

5. The sole dissenters were the Gross Defendants who demanded "ransom" in the form of substantial cash payments as the price of their approval of the agreement whereas all other parties accepted "paper" in the form of a long term note and securities in Newburger, Loeb & Co., Inc., the corporation formed to carry on the firm's business.

6. Their threats included that of seeking injunctive relief against the transaction, a project they never actually undertook. Indeed their own attorneys recommended that they join in the transaction but that recommendation was discarded in favor of a self-seeking posture in callous disregard of the plight of the firm or of the threat of the Exchange to effect its immediate demise.

7. It was upon this background that the business of the company was preserved despite these selfish attempts to hold the economic well being of all of the general and limited partners and subordinated lenders hostage to extortionate demands.

It should be noted at the outset, however, that the Gross Defendants were not treated in like manner by the terms of the transaction which made specific provisions for payment of their claims if they proved of value.

B. AN OUTLINE OF THE FACTS

8. The purpose of this affidavit is to demonstrate the following:

a. Commencing November, 1970 to and including the very moment of execution of the Transfer Agreement, the Partnership was and remained under threat of immediate liquidation by the New York Stock Exchange unless it were able to reorganize;

b. By entering into the Transfer Agreement the business of the firm was in fact preserved;

c. Prior to execution of the Transfer Agreement defendant Gross had resigned as a partner in the firm, and his only right against the Partnership was a money claim subject to formula computation pursuant to the Partnership Agreement. As a non-member of the firm he had no standing to object to the transaction;

d. As to deponent and his law firm who have been made the subject of a scurrilous charge of alleged breach of duty to the Gross Defendants it will be shown that at no time did either I or the firm represent any of the Gross Defendants; that they had their own personal counsel in the matter; that the duties of deponent and his firm were owed primarily to the Partnership and not to the self-seeking individual defendants; and no conduct on our part in any event was inimical to any legally protectable interest on their part;

e. Defendants specifically waived any claim they may have had to equitable relief against the transaction.

9. Further and at the very outset I wish to categorically deny the contemptible charge that I was at any time a member of any conspiracy whatsoever to injure defendants, or any of them, or to deprive them of any of their rights and further wish to unequivocally make that blanket denial on behalf of my firm.

C. THE THREAT OF THE EXCHANGE TO CLOSE NEWBURGER, LOEB & CO.

10. Some flavor of the economically crippled condition of the Partnership in or about mid 1970 will be garnered by the court from the detailed recitations of the affidavit of Ned D. Frank, a former general partner of the firm.

My introduction to the Partnership and that of FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, the precedessor to my present firm, came in the latter part of August, 1970. The first project we undertook on behalf of the brokerage house was the review of its problems at 1 New York Plaza (See Frank affidavit pp. 11-12). Our next venture on its behalf involved preparation of a clearing agreement with W. E. Hutton which removed clearing functions from the firm as part of the cleanup campaign directed by the NYSE.

11. The NYSE which had become informed of the crisis conditions at the firm, moved to eliminate the difficulties or, in the alternative, threatened its immediate closing. A review of the severity with which they viewed the situation and the actions they undertook is set forth in the NYSE affidavit by its representative Fred J. Stock, submitted herewith.

12. On November 17, 1970 the NYSE wrote to the firm:

> "Under the circumstances and in view of your impaired capital position and loss trend, this Department is left with no alternative but to approach the Board of Governors and ask for your suspension under Article XIII of the Exchange's constitution if your "REQUIRED EXCESS CAPITAL" is not met by the close of business on November 20, 1970. A signed merger agreement filed with this Department by the close of business on November 20, 1970, will be acceptable in lieu of the REQUIRED EXCESS CAPITAL.
>
> "In the meantime, you are directed to take every possible anticipatory step to prepare for possible liquidation of your firm, such as discontinuing any purchases for your firm trading and investment accounts, liquidating proprietary positions, and other administrative procedures in the event of a suspension by the Board of Governors."

A true and correct copy of that letter is annexed as Exhibit "B".

13. During the fall of 1970, prior to the Exchange making its formal threat (Ex."B") and in an effort to stave off such an eventuality, I met with the general partners and with counsel representing them, including Dan Kaplan and Ben Raphan of the firm of Tenzer, Greenblatt & Kaplan; Jed Golenbock of the firm of Golenbock & Barell, and, in October with Max Freund of Rosenman, Colin, Kaye, Petsheck, Freund and Emil.

During that month a meeting was held at our offices during which the financial condition of the Partnership was revealed in detail not only to the general partners, but for the first time to the limited partners and subordinated lenders. Many of those in attendance were represented by their own counsel.

Our goal at this time and subsequent to the receipt of the formal warning was to save the business of the Partnership and to place it on a firm economic footing.

14. By December 17, 1970 a written plan of the proposed reorganization of the firm was submitted to the NYSE. That plan, inter alia, contemplated the creation of a corporation to continue the business of the Partnership. Failing success or approval of the plan, steps in orderly liquidation of the Partnership business were likewise set forth.

15. Continual contacts were had with the NYSE keeping them up to date on our progress, still under formal threat that the firm was facing destruction if reorganization was not accomplished. On December 23, 1970, the Department of Member Firms of the NYSE wrote:

> "We expect a final agreement to this plan and reorganization to be accomplished by December 31, 1970 and the formal executed documents filed with this department on January 4, 1971.
>
> "If this cannot be accomplished, or if your plan for discontinuing the firm has not been implemented by that date, this department will approach the Board of Governors and ask for your suspension under Article XIII of the Exchange Constitution on January 5, 1971."

A true and correct copy of that letter is annexed as Exhibit "C".

Under the sword of the NYSE, and in an all night session ending on December 31, 1970, a contract was signed composing the disparate interests of general partners, limited partners and subordinated lenders.

16. The contract contemplated the creation of a corporate entity to perpetuate the business of the firm and a proposed infusion of $1,000,000 in new subordinated capital. The creation of such a corporation was in large part necessitated by the conviction of counsel for several of the general partners who believed that the situation had so far deteriorated that the partnership would likely be forced into liquidation and the general partners into personal bankruptcy (See Risher affid. pp. 3-5) and by the demand of the NYSE that the firm be reorganized.

17. Finally, under notice by the NYSE that failure to consummate the transaction by February 12 would require its immediate suspension, the final agreement was executed on February 11, 1971. On February 16, 1971 the secretary of the Exchange wrote to the corporation:

> "I am pleased to advise you that the Board of Governors at its meeting on February 11, 1971 approved Newburger, Loeb & Co., Inc., as a member corporation of the New York Stock Exchange effective February 11, 1971."

A true and correct copy of that letter is annexed as Exhibit "D".

18. What emerges, then, is that the Transfer Agreement had its genesis not in any so-called conspiracy as charged by the Gross Defendants, but in the market place under the continuing ultimatum of the NYSE commencing with its November 17, 1970 letter to either reorganize and achieve new capital or be destroyed.

D. THE PRESERVATION OF THE PARTNERSHIP BUSINESS THROUGH THE MEDIUM OF THE TRANSFER AGREEMENT

19. The Transfer Agreement (Ex. "A") was the medium through which the business of the partnership was preserved. The corporation received assets of the partnership (¶1) and assumed all of its liabilities as of December 31, 1970 (¶2) while ¶8 (pp. 14-17) required that the firm's business be maintained intact until closing thereby permitting the uninterrupted transfer of business activities.

As to the Gross Defendants, rather than excluding them from the benefits of the Agreement, their claims were specifically assumed to the extent, if any, that they were valid (Schedule C, p. 2). What emerges, then, is not a plan or scheme designed to defraud Gross and his cohorts, but a well conceived restructuring of the firm and the infusion of substantial new subordinated capital (Transfer Agreement p. 28(f)) designed to resuscitate and preserve the business of Newburger, Loeb.

It will further be noted that rather than receiving cash such as that demanded by the Gross Defendants, the parties to the Agreement accepted subordinated convertible notes and

securities (Transfer Agreement pp. 17 et. seq.), the decision to accept this "paper" rather than cash being the sine qua non of the ability of the business to survive.

Under the protection of this Agreement, the business of the firm has moved from near insolvency to a sound footing as set forth in the affidavit of John Smith, Controller of the corporation.

E. THE WANT OF STANDING OF ALL GROSS DEFENDANTS TO OBJECT TO THE TRANSFER AGREEMENT

20. Gross admits that he gave notice effective September 30, 1970 of his withdrawal from the Partnership pursuant to the terms of the Partnership Agreement (Gross 9G statement ¶4).

By the terms of the Partnership Agreement, on giving that notice of withdrawal he ceased forthwith to be a partner in the firm for any purpose. Artice VII of that Agreement (p. 26) provides in relevant part as follows:

"VII. CEASING TO BE A PARTNER

7.1 Voluntary Withdrawal

a. Any General Partner may withdraw from the partnership upon not less than thirty (30) days written notice to the partnership and to the New York Stock Exchange. Upon the effective date set forth in such notice, the partner giving notice shall cease to be a partner for all purposes . . ." (emphasis added)

21. As to defendants Donaghue and Bleich, the Partnership Agreement makes clear that as limited partners only they never had any power to vote approval or disapproval of any acti-

vities of the firm.

Article IV of the Partnership Agreement (pp. 13-14) thus provides in relevant part:

"IV. CONDUCT OF THE BUSINESS

4.1 The General Partners shall carry on, manage and have full control of the partnership business . . .

* * *

4.3 Leo Stern, Robert L. Newburger, Andrew M. Newburger, Robert L. Stern, and Charles H. Gross will constitute an Executive Committee of the General Partners which Committee by affirmative vote of a majority in number of its members shall have full power and authority on behalf of all of the partners of this firm at any time and from time to time to manage the affairs and the business of the partnership, to the exclusion of the other General Partners . . . " (emphasis added)

22. Moreover, upon withdrawal of a general partner, the Agreement provided in Article VIII for a complex formula to determine the amount, if any, to be paid to a withdrawing general partner and made clear that he was not entitled to receipt of any funds for a period of a year from the effective date of his withdrawal.

Paragraph 8.3 provides:

"8.3 The partnership interest of a former General Partner who has withdrawn pursuant to ¶7.1 . . . shall remain in the successor firm and at the risk of the business for a period of twelve (12) calendar months from the effective date." (p. 32)

A limited partner was to be paid the amount of his capital six months from the date of written notice of withdrawal to the partnership (p. 27).

23. Accordingly, by the plain terms of the Partnership Agreement and further in the case of Gross by virtue of his with-

drawal as well, none of the defendants had either authority or standing to object to an agreement whose effect was to preserve the partnership business. As mere creditors under that agreement their claims, then, are for money only, and, on balance, when viewed in the light of the overwhelming claims of damage by Gross' wrongdoing (See Ned F[illegible]t Affid.) and of the Buckley claim, leave a considerable margin in favor of the plaintiff corporation.

F. CANARD OF CONFLICT OF INTEREST - THE PROPRIETY OF THE OPINION LETTER

24. In an amended pleading, defendants for the first time in this case, raise the specter of alleged conflict of interest as a claimed basis for joining deponent and his firm.

25. It should be made clear at the outset that at no time did I or my lawfirm represent any of the defendants. Instead, throughout the negotiations leading to the Transfer Agreement all of the defendants were represented by counsel of their own choosing, originally by Messrs. Golenbock & Barell until Gross retained Philip Mandel, Esq., as his separate counsel.

26. Deponent and his firm did represent the partnership entity in day to day legal matters. In the negotiations the partnership was represented as an entity first by Lawrence Berkowitz, Esq., house counsel and former SEC attorney and, Rosenman, Colin, Kaye, Petschek, Freund & Emil who acted as special counsel in relation to the Transfer Agreement.

27. At the conclusion of the matter, the various general and limited partners and subordinated lenders, and

defendants Gross, Bleich and Donaghue were all represented by their own attorneys. In some instances husbands and wives who fell into different categories (i.e. general partners and subordinated lenders) retained separate counsel.

28. The context, then, of the negotiations and of the execution and delivery of the Transfer Agreement was one in which defendants were never represented by deponent or his firm but by their own separate attorneys thereby undercutting any basis of a claim of conflict of interests.

29. It is entirely captious for defendants to claim at this late date that the Transfer Agreement is evidence supporting their claim of conflict of interest. Indeed, on December 31, 1970, Golenbock & Barell wrote that they believed the Transfer Agreement to be in Donaghue's best interest:

> " . . . Golenbock & Barell (i) believes the agreement to be in her best interest and (ii) will undertake with reasonable dispatch to apprise Mrs. Donaghue of the provisions of the agreement and to recommend her acceptance thereof."

A true and correct copy of that letter is annexed as Exhibit "E".

As to Philip Mandel, Esq., who now so vigorously asserts the alleged impropriety of the agreement, his papers omit to mention that shortly before the closing he advised me and other attorneys assembled at the offices of Golenbock & Barell that he would strongly recommend that his client Gross execute the agreement as being in his best interest and that following a lengthy telephone conversation between Gross and Mandel the latter conveyed his apologies for his inability to persuade his client to approve the transaction.

30. Defendants seek to create the impression that the Transfer Agreement was concluded in clandestine circumstances. Nothing could be further from the truth. Counsel for each of the defendants was kept apprised of the developments in connection with the negotiations. In November and December, 1970, they participated regularly in the talks. On Friday, January 15, 1971 Paul Risher, Robert Muh and deponent met with Mr. Mandel in his office together with defendant Gross and discussed the possibility of resolving conflicting claims between the partnership and Gross.

Telephone contact was maintained with Mr. Mandel during the following week and on February 5, and 8, 1971 there were two meetings and Golenbock & Barell attended by many of the attorneys whose clients were involved in the Transfer Agreement and by Mr. Mandel representing Gross.

31. At or about January 15, 1971 it was in fact agreed that Mr. Mandel would be placed on our list of distributees of the various documents to be circulated in connection with the transaction and such documents were in fact delivered to Mr. Mandel. This, despite the fact that Gross had by this time, already notified us of his intention to demur to the agreement.

Accordingly, it is plain that no conspiratorial conduct was involved, each of the defendants being fully represented by counsel of their own choosing, each of whom was kept abreast of developments and relevant documentation thereby again totally undermining any claim of breach of fiduciary duty on the part of deponent or his firm.

32. In an effort to create substance to a baseless claim of breach of fiduciary duty, defendants charge that deponent and his lawfirm were motivated to deprive defendants of their so-called "rights" by the opportunity to receive some 43,200 shares of non-voting stock in the new corporation.

33. That contemptible suggestion is utterly false. For our services we were paid a legal fee only. In March 1971, after the closing, deponent met with Paul Risher, Robert Muh and Fred Kayne, principals of the corporation, and discussed our fee. At that time they expressed appreciation for the diligent efforts of my firm and of the result to which we had largely contributed in maintaining the business in the best interests of all parties concerned. They stated in substance that even a substantial fee could not adequately compensate us for the work performed and results achieved.

In light of the precious nature of cash in the new firm, they said it would be in the interests of the corporation to reduce my firm's cash fee if possible and to present instead an "opportunity" to have an equity position in the firm by receiving stock in lieu of a portion of the fee. It was ultimately agreed that I would accept this position and the shares in my name represent 3.55% of the 1,214,601 shares of common stock (voting and non-voting) now outstanding.

34. At no time, then, did any activity have its genesis in any "bribe"; our work was limited to the performance of legal services for which we were paid a fee only.

35. A principal underpinning of defendants' argument in this connection is the totally distorted reference to the opinion letter given by my lawfirm at the closing on February 11. A true and correct copy of that letter is annexed hereto as Exhibit "F". As more fully detailed in the affidavits of Robert Steefel, Esq., (Stroock and Stroock and Lavan); Richard Ticktin, Esq., (Ticktin & Malkin); Charles E. Lewis, Esq., (Wilkie, Farr & Gallagher); Ronald Itzler (Ballon, Stoll and Itzler), the circumstances under which the opinion was given were in all respects proper.

36. It had been previously understood that Messrs. Rosenman, Colin, Kaye, Petschek, Freund & Emil would render an opinion on behalf of the partnership approving the Transfer Agreement. The night of the closing the senior partner of that firm in charge of the matter did not appear. Instead, his younger partner startled the group by stating that the opinion would not be given. At that point request was made at the table as to who among counsel was familiar with the application, if any, of Partnership Law section 98. I advised that we had looked into that matter and accordingly was requested by the group to provide the opinion. As the said affidavits confirm, deponent circulated a draft of that opinion; it was read and reviewed by each and every one of the attorneys present and not a single one, including Paul Burak, Esq., of the Rosenman office demurred in any way from the facts or conclusions set forth therein.

37. Indeed, the following seemed plain to me:

a. We had been advised that the Executive Committee of the partnership, each of whose members, without exception, executed the Transfer Agreement, had ratified the same;

b. Under Article IV section 4.3 of the Partnership Agreement whose relevant terms are set forth at page 10 of this affidavit, the Executive Committee had full power and authority on behalf of all of the partners to manage the business and affairs of the partnership;

c. Failing execution of the Transfer Agreement the business of the partnership would have been terminated by the NYSE and the agreement was the only available medium to maintain that business and to secure required capital to prese the operations of the firm;

d. Defendant Gross had resigned from the firm and was no longer a partner thereby divesting himself of any color of right to object to the transaction;

e. In any event, the provisions of the Partnership Law, Section 98 required consent only by limited partners, not general partners under the terms of the Partnership Agreement the limited partners had given all of their rights in connection with management of the affairs of the partnership to the Executive Commitee;

f. The partnership never ceased to exist and survives as an entity to this day.

All of these facts, in deponent's view, both personal and professional, more than adequately support the propriety of the Transfer Agreement and therefore the opinion letter confirming the same.

G. THE COMPLETE PROPRIETY OF THE BUCKLEY CLAIM

38. The charges set forth against defendant Gross and his former firm Gross & Company were not pleaded maliciously as he suggests, but were prepared in order to set forth in concise

fashion at least one of the claims against him which the partnership believed it had. (See Frank Affid.)

39. The churning claims set forth therein were prosecuted after the partnership had commenced proceedings against David Buckley before the NYSE. Newburger, Loeb & Co., was then represented by Golenbock & Barell and when the churning claim was asserted by Buckley as an offset to the claims of the partnership, no disclosure was made to the general partners of Newburger, Loeb or its Executive Committee that the period of time involved in the churning claim covered an interal when Gross operated a NYSE member firm independent of the partnership.

40. It was further plain that although Gross & Co. cleared through the partnership, the rules of the NYSE and SEC and relevant case law demonstrated that it was the obligation of the originating broker, i.e. Gross & Co., to supervise the account and insure that no churning occurred.

41. The facts asserted in the claim were derived by deponent from the Buckley file received from Golenbock & Barell and from the Answer, Setoff and Counterclaims filed by Buckley with the NYSE and from interviews with partners and associates of the lawfirm of Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, the attorneys representing Mr. and Mr. Buckley. A copy of that pleading is annexed as Exhibit "G".

42. The court's attention is respectfully directed to the first counterclaim therein which sets forth the operative facts constituting the churning claim. That document is dated August, 1970.

43. Some issue has arisen as to why Charles Jordan whose affidavit identifies himself as the representative of Gross & Co. handling the Buckley account, was not similarly identified in the pleading by Newburger, Loeb of the churning claim, and why defendant Gross is charged therein with direct responsibility for the churning. At the time I drafted the complaint, I believed that when Buckley's attorneys, Webster, Sheffield spoke of "Gross" they meant Charles Gross and not his firm and I believed that Gross himself was the broker for Buckley. Although Jordan's affidavit concedes that he was the broker on the account, that fact does not relieve the principals of Gross & Co. from the duty to supervise him from ultimate liability in the event the Buckley claim is found valid.

44. It is utter fabrication to state that the Buckley claim was settled as a means of creating a claim against Gross where none existed. In fact, the aim of settling the claim was to procure as much cash as possible for the partnership and to that end Mr. Buckley's father paid $50,000 in cash to settle the claim, Buckley himself being apparently judgment proof.

The concept of taking an assignment of his claim against Gross arose out of the performance of my duties to the partnership as an entity rather than to Gross, a non-partner; especially since the claim arose out of his activities prior to becoming a member of the partnership. Why Messrs. Golenbock & Barell did not see fit to bring this fact to the attention of the partnership at an earlier date can only be surmised at this time.

45. It is plain that our obligation to the partnership to preserve for it such rights as it had against Gross was our primary duty and the same was observed. It was not our responsibility to adjudicate Buckley's claim and the disclosure of the complaint to Mr. Mandel and the other attorneys present at the Golenbock & Barell conference was to demonstrate the fact that claims against Gross were real and substantial and not fanciful.

H. DEFENDANTS' WAIVER OF THEIR CLAIM FOR RECEIVERSHIP

46. One of the forms of relief requested by defendants is a receiver for the corporation. Defendants have the temerity to seek such relief after they permitted the transaction to be consummated; the corporation to be created and its business to progress, fructify and proliferate in the 1-1/2 year period since February 1971.

47. Prior to execution of the Transfer Agreement Mr. Mandel had advised that he was then contemplating an injunction against consummation of the transaction. I viewed this as a further attempt to hold the transaction hostage to his clients' selfish demands.

As a precautionary measure, however, our firm contacted the office of the Clerk of Special Term, Part II of the Supreme Court, New York County and requested that they inform us of any ex parte application made on behalf of Gross to seek temporary restraint in order that we might be heard in opposition to such request.

48. During the 3 or 4 days preceding the actual closing, however, I spoke again with Mr. Mandel who informed me that he had decided not to attempt to obtain a restraining order because he felt his client's interests would best be served by allowing the creation of a viable entity which might be better able to respond to his claims.

49. Having thus permitted the transaction to go forward and having failed to seek relief at that early date, it is now outrageous for defendants to assert a claimed "right" to the appointment of a receiver particularly in view of the entirely viable economic circumstances of the corporation (See John Smith Affid.)

I. CONCLUSION

50. Since the attention of the court has necessarily been focused upon the charges and countercharges raised in the papers submitted in connection with the various pending motions, it is most difficult that these details be placed in the proper perspective as they actually arose during the course of the negotiations.

51. Having lived through those trying times deponent is able to state as a matter of personal knowledge that matters involving defendants were but the smallest part of our concern; with the NYSE continually threatening to destroy the firm; with general partners, limited partners and subordinated lenders all clamouring for cash payments and for treatment peculiarly favorable to them before the business died from its chronic ills; and with time being almost as precious a commodity as money, the

idea that all of the additional defendants devoted any effort or attention whatsoever to mounting a malignant effort directed against Gross, Bleich and Donaghue is utterly absurd.

52. Deponent and the representatives of the other 17 firms attending at the closing believed then, as I do now, that these three spoilers had nothing more than claims as creditors; had no standing to object to the transaction; that their subversive efforts were of small moment in the larger picture designed to save a fast sinking enterprise and indeed that an inevitable by-product of the success of the transaction was their actual benefit and not their disadvantage.

53. On the basis of all of the foregoing, deponent respectfully requests that the motions by plaintiff and the additional defendants be in all respects granted; that defendants' motion be in all respects denied and that plaintiff and the additional defendants be granted such other, further and different relief as the court may deem proper.

Sworn to before me this
10th day of July, 1972.

Alan M. Gelb

ALAN M. GELB
Notary Public, State of New York
No. 31-6481960
Qualified in New York County
Commission Expires March 30, 1974

Robert S. Persky

ROBERT S. PERSKY

Exhibit A to Persky Affidavit

Agreement between Newburger, Loeb & Co. Inc. and Newburger, Loeb & Co., dated December 31, 1970, with Newburger unaudited balance sheet as of December 31, 1970, together with Schedules A-F,

See Plaintiff's Trial Exhibit 24.

Exhibit B to Persky Affidavit

Letter N.Y.S.E, dated November 17, 1970
to Newburger, Loeb & Co.,

See Plaintiff's Trial Exhibit 1.

10-138 2/70

Exhibit C. to Persky Affidavit.

W. D.

NEW YORK STOCK EXCHANGE

DEPARTMENT OF MEMBER FIRMS
4 NEW YORK PLAZA
AT BROAD AND WATER STREETS
NEW YORK, N. Y. 10004

158

December 23, 1970

COPY

Newburger, Loeb & Co.
5 Hanover Square
New York, New York 10004

Attention: Mr. Robert L. Newburger, Chairman Executive Committee

Gentlemen:

In consideration for the executed extension of limited partners' capital withdrawals and the subordination agreement of Betty H. Newbourg through January 5, 1971, an extension of time is granted until January 4, 1971, for Newburger, Loeb & Co. to accomplish the written plan and reorganization and recapitalization as outlined in your letter of December 17, 1971.

We expect a final agreement to this plan and reorganization to be accomplished by December 31, 1970 and the formal executed documents filed with this department on January 4, 1971.

If this cannot be accomplished, or if your plan for discontinuing the firm has not been implemented by that date, this department will approach the Board of Governors and ask for your suspension under Article XIII of the Exchange Constitution on January 5, 1971.

Please acknowledge receipt of this letter by signing the enclosed copy and returning it to us promptly.

Sincerely yours,

Fred J. Stock, Jr.
Assistant Vice President

RECEIPT IS HEREBY ACKNOWLEDGED _____

Persky Affidavit Exhibit "C"

Exhibit D. to Persky Affidavit

NEW YORK STOCK EXCHANGE
ELEVEN WALL STREET
NEW YORK, N.Y. 10005

JOHN J. MULCAHY, JR.
SECRETARY

159

February 16, 1971

Mr. Fred Kayne
5 Hanover Square
New York, New York 10004

Dear Mr. Kayne:

I am pleased to advise you that the Board of Governors at its meeting on February 11, 1971 approved Newburger, Loeb & Co., Inc. as a member corporation of the New York Stock Exchange, effective February 11, 1971.

Our records have been noted to show the Officers, Directors and Stockholders as they were published in the Weekly Bulletin dated February 12, 1971.

Very truly yours,

John J. Mulcahy, Jr.

Persky Affidavit Exhibit "D"

Exhibit E to Persky Affidavit

Letter from Golenbock and Barell dated December 31, 1970, addressed to "Whom This May Concern.",

See Plaintiff's Trial Exhibit 51.

Exhibit F to Persky Affidavit

Letter from Finley, Kumble dated
February 11, 1971 to Newburger, Loeb & Co.,

See Plaintiff's Trial Exhibit 43.

Exhibit G. to Persky Affidavit

Arbitration: Answer, Set-Off and Counterclaim, concerning a controversy between Newburger, Loeb & Company, Petitioner, and David Buckley and Mary Buckley, Respondents.

See Plaintiff's Trial Exhibit 28.

Frank Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NEWBURGER, LOEB & CO., INC., as assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

----------x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

NED D. FRANK, being duly sworn, deposes and says that:

1. I am one of the additional defendants on counterclaims sought to be interposed in this action. Except as to items stated upon information and belief I have personal knowledge of the facts set forth herein, and submit this affidavit in opposition to defendants' motion for summary judgment.

2. One of the principal props to defendants' motion is the assertion that some sort of plot or scheme among the

various additional defendants herein was hatched in the fall of 1971 with the object of depriving defendants of their alleged rights under the Newburger Loeb Partnership Agreement.

3. At the outset, I wish to make the record clear in this regard:

At no time did I agree directly or indirectly with any of the additional defendants on counterclaims, with plaintiff or with any other person, firm or corporation to deprive any of the defendants of their rights, nor was any such scheme the subject matter of any conversation between myself or any other person in the world, nor to my knowledge did any of the additional defendants or any other person, firm or corporation so conspire.

I have not conspired or acted in furtherance of any plot or conspiracy to do harm or injury of any sort to any of the defendants, nor have any others done so.

4. Indeed, I believe that the transaction of which the defendants now complain was distinctly to their own benefit. In truth and in fact, as I will hereinafter detail for the Court:

a. As early as August 1970, Charles Gross was ousted as Managing Partner of Newburger Loeb upon discovery of the enormity of his mismanagement of the firm which brought it to the verge of financial disaster and as a result of discoveries that he had both deceived and severely damaged his copartners and subordinated lenders to the firm;

b. Despite specific provisions in the Partnership Agreement forbidding any member of the firm to unilaterally make investments for the partnership, Charles Gross commencing in or about February 1970, wilfully violated that provision by surreptitiously purchasing large quantities of shares of the Common Stock of City Investing Corp., and other securities resulting in a financial debacle to the firm upon information and belief of over $140,000;

c. He deliberately suppressed and withheld information of these clandestine machinations from deponent and as

confirmed to me by the members of the Executive Committee, from them as well;

d. In further gross breach of the Partnership Agreement he caused and permitted the firm to make material misrepresentations to the Board of Governors of the New York Stock Exchange resulting in part in fines to the firm aggregating some $50,000;

e. At a time when I now find the firm was threatened with insolvency, it was a party to a 20 year lease for new space at an aggregate rental of nearly $6,000,000 which it could not pay. Upon information and belief Gross received an offer from the landlord to "buy back" the lease for a sum which may have been as much as $100,000 and that he not only failed to communicate that offer to the firm, but summarily rejected it. As a result the firm was ultimately obliged to pay the landlord substantially in excess of $430,000;

f. Defendant Gross recommended to the Executive Committee of the firm that it enter into a joint venture with one Lewis Bracker in the brokerage business despite his knowledge, never communicated to the firm, that he had been warned that Bracker was not a person of good character or reputation in his business dealings and that the firm would be likely to experience difficulties if the firm entered into such a business relation;

g. Further, deponent will demonstrate that the complaint fails to state a cause of action as to him since I had resigned prior to the execution of the Transfer Agreement, was not a party thereto and received no securities thereunder.

5. The suggestion, then, that claims against Charles Gross were fabricated in order to penalize him for his demands that he be uniquely treated, by providing him with cash payment where all other partners both general and limited, and all subordinated lenders were receiving "paper", is nothing more than an outrageous contrivance designed to mislead the court into believing that he had somehow been put upon. As will be demonstrated herein, it was Gross who sought undue advantage against his partners, breached his fiduciary duty to them and not vice-versa; and

after bringing the firm to the edge of financial collapse had the temerity to ignore his own wrongdoing and to seek substantial cash rewards therefor in a demonstration of greed and self-seeking of which deponent knows no parallel.

A. DEPONENT'S BACKGROUND AND EXPERIENCE

6. Deponent is a former general partner of Newburger Loeb & Co. I attended Bucknell University from 1954 to 1957, graduated St. John's Law School in 1960 and was admitted to the Bar of the State of New York in that year in the First Judicial Department.

Thereafter I served from August 1960 to May 1961 as an Assistant United States Attorney for the Eastern District of New York in both the Criminal and Civil Divisions and from May 1961 to October, 1962 and as an Assistant United States Attorney for the Southern District of NewYork in the Criminal Division.

Between January 1963 and March 1964, I was a partner in the law firm of Schultz, Frank & Sussman engaged in general practice, departing from that firm in March 1965 to act as a special trial attorney for the United States Department of Justice in Washington, D C. in the Criminal Division.

From March 1965 to October 1967, I was a general partner in the New York Stock Exchange member firm of Rosen, Deutschman & Co., a non-clearing firm, and served as its general counsel.

In October 1967 I became a registered representative with Newburger Loeb & Co., changing my relationship with the

firm in January 1969 to become a general partner and house counsel until November 30, 1970. From then to December 1970, I acted as a registered representative for the firm, resigning in January 1971 to become associated with the law firm of Ballon, Stoll and Itzler in the general practice of law. For a brief time between April and June, 1971 I acted as trader for Newburger Loeb and since 1971 have been a partner in the firm of Sheldon, Tarnoff & Frank, 292 Madison Avenue, New York, New York.

B. MY CHANCE DISCOVERY OF THE GROSS SECRET STOCK TRANSACTIONS

7. In or about May, 1970, while I was general partner at the firm, I met a friend named Michael Seidel, a broker and floor partner of the firm of Pearlberg, Moness, Williams, Day and Sidel, at a club of which we were both members. During the course of the conversation he asked : "Has Gross sold the City Investing?"

I replied in substance that I had no knowledge of the matter. He then advised me that he had executed purchases on the floor of the New York Stock Exchange on behalf of Newburger Loeb & Co., for its own account of many thousands of shares of City Investing Corp., and other securities, upon the order of Charles Gross.

8. Indeed, as partner in charge of compliance and surveillance, it was one of my tasks at the firm to review daily each and every trade in listed or over-the-counter securities made on behalf of any of the firm's customers or for itself and had never seen a single trade for the firm account in City Investing stock.

9. The next morning, I contacted Edwin Rubin, who was in charge of our order room, a long time friend of defendant Gross who had secured for him his partnership in the firm. I confronted Rubin with the information I had gathered from Mr. Seidel and finally he admitted that defendant Gross had personally placed the order from our order room and directed Rubin not to tell anyone about it. Rubin advised me that Gross also directed him not to enter these transactions on the daily blotters which, as surveillance partner would immediately have brought these trades to my attention.

10. Shocked at these disclosures, I immediately proceeded to Gross' office and confronted him with the information I had learned.

With great dismay, he pleaded that it was the only way he, as a trader by experience, knew how to "bail the firm out of its financial condition".

He further admitted that he had told Rubin to conceal these activities from the rest of the firm to prevent what he called "panic".

When I queried him as to what "financial condition" he spoke of and why the partners should panic, he admitted that the firm was in poor economic straits; that we were losing substantial amounts of money, had serious capital problems and that he hoped through a killing in City Investing and other securities to re-

vitalize the firm's failing fortunes.

11. I was amazed at these revelations since Gross, the Managing Partner of the firm, had never so much as hinted at such impending disaster.

12. These clandestine activities, then, were not only in flagrant breach of defendant's fiduciary duties to his partners not to conceal major undertakings of the firm from them or to expose them to unwarranted risks or unilateral adventures of any kind, but was in unequivocal breach of the precise mandate of the Partnership Agreement expressly forbidding this conduct.

Paragraph 4.2 of the Partnership Agreement (Exhibit A annexed hereto) provides:

> "4.2 The General Partners as among themselves shall be governed by the following rules of conduct:
>
> * * *
>
> (b) No General Partner shall:
>
> * * *
>
> (2) Wilfully do any act adverse to the interest of the firm;
>
> (3) Except as provided in paragraph 4.4 make any investment for the firm account or enter into any syndicate * * * "

Paragraph 4.4 provides that:

> "4.4 The Executive Committee designated in paragraph 4.3, or its designee or designees, is further authorized and empowered to make investments for the partnership and to enter into syndicates on behalf of the partnership in connection with any matter, thing or venture they in their discretion deem proper."

13. The copies of monthly statements annexed as Exhibit "B" graphically recount the details of these unauthorized transactions. They reflect purchases of City Investing stock commencing in February, 1970 aggregating 13,800 shares in that month at a cost of over $263,000; further purchases in April

1970 of an additional 6,200 shares for a total cost to that date of $355,944.19. The May 1970 statement reflects 17 separate and additional purchases bringing the total to 35,000 shares at a cost of $614,281.

Following discovery of this illicit activity and the sale of all 35,000 shares, the June statement shows a total loss of $79,867.45. The July statement reflects the final balance in the account at $80,882.45 after addition of $1,015 in clearing charges.

14. The furtive nature of these dealings is highlighted by the fact that Gross apparently had a special account opened for the sole purpose of these and other trades which he designated "900 Account c/o Chares Gross" and was not even in the name of Newburger Loeb & Co.

15. Documents at the firm further reflected Gross' purchase in May 1969 of 3,600 warrants of Tyco Laboratories, Inc., at $24 each for a cost of $86,000 thereafter reduced to $84,560.17 by trades in Tyco shares.

By letter of April 12, 1971 the firm sent payment of an additional $18,000 for 3,600 Tyco shares and purchase of 400 additional shares.

16. The April, 1971 statement showed sale of 3,600 shares of Tyco at 9-7/8 for total proceeds of $35,313.48, producing a total loss on these peccadillos of $67,246.69.

17. Thus, between the City Investing and Tyco trades only, the firm suffered a total loss of $148,129.14.

18. It thus emerges that Gross' activities in making these investments was a clear breach

of the Partnership Agreement; the result a financial disaster; while his Byzantine machinations designed to cloak these adventures were both an ethical and legal breach of his fiduciary duties to the firm.

C. THE DECISION TO OUST GROSS AS MANAGING PARTNER

19. The disclosure of the City Investing debacle and of the firm's financial plight led me to undertake investigations to try to uncover whatever other horrors had been concealed in the "woodwork" under the Gross tenure as Managing Partner.

20. Further inquiries indicated that our back office operations were still in utter chaos; that the firm had substantial quantities of securities whose owners were not revealed by our records; that our capital position was in grave jeopardy; that liabilities of the firm were enormous and that under Gross' hegemony as Managing Partner, the firm appeared to be at the very lip of financial disaster.

21. Utterly dismayed at these woeful circumstances, I flew to Los Angeles with Robert Therese in or about mid-July 1970 to meet with Fred Kayne and Charles Sloane, General Partners in charge of our Los Angeles office. The purpose of this trip was to acquaint them with the crisis conditions I had uncovered and to decide what might be done to resurrect the company.

22. Having advised my partners that I was there to tell them that both the firm and we as individuals were on the verge of bankruptcy, and having discussed these and other issues at length, we resolved to meet with defendant Gross and tele-

phoned John F. Settle, a partner in the firm and member of its Executive Committee, to ask that he join in the meeting.

On Monday or Tuesday of the next week we met and aired our consternation in hard candid terms. The product of the meeting was as follows:

a. The younger partners would be appointed to and become a majority of the Executive Committee;

b. Fred Kayne would move on a temporary basis from Los Angeles to New York and assume the position of Assistant Managing Partner, with Gross' functions as Managing Partner to be phased out of that position and his position to be filled by Mr. Kayne;

c. None of us would resign from the firm prior to December 31, 1970

23. Such agreement having been made, it was put into effect. Younger partners including myself, Fred Kayne, John F. Settle and Robert Therese became members of and constituted a majority of the Executive Committee; Charles Sloane became an alternative member; Andrew Newburger and Leo Stern resigned and became alternative members; Mr. Kayne moved to New York with the title of Assistant Managing Partner and in fact began the exercise of the actual powers of that office. Further, the firm retained Paul Rischer and Robert Muh as consultants to assist it in the recovery of its economic well-being.

To this end we resolved to accomplish three immediate objectives:

a. The sale of the basketball team;

b. To make Newburger Loeb a non clearing firm thereby removing the financial risk to the firm's accounts; decreasing the amount of capital the firm needed to stay in business; eliminating the economic drain caused by back office operations;

c. Ridding the firm of a huge potential liability in the form of a lease previously executed for new premises in New York Plaza.

Shortly thereafter and as a direct result of the mismanagement and improper activities on the part of defendant Gross, he actually resigned as Managing Partner in August, 1970.

D. GROSS' NEW YORK PLAZA FIASCO

24. In November, 1969, while the firm was under the direction of Gross as Managing Partner, it signed a 20 year lease on space at One New York Plaza at a base rental for each of the first 10 years of $305,395.89 and for each of the next 10 years at $277,604.25 per year. This $5,800,000 obligation was clearly, in and of itself, sufficient to bankrupt the firm.

Having taken my position as a member of the Executive Committee I met with the landlord, Sol Atlas, and advised him that we could not take possession of the premises and that the company was in such dire financial straits that it would be unable to support the rental obligations under the lease and that we wished to arrange to be released from its terms. He replied in substance that it was amazing how things could change so in just a short time, since he had told Gross several months prior to our meeting that he was anxious to buy back the lease and that he had a tenant for the entire floor at a more favorable rental. (We had leased only one half of the floor.)

Pursuing the conversation further he advised me that at that time he might have paid as much as $100,000 to buy back the lease and that when he met with Gross in the latter's office, Gross had summarily rejected any consideration of selling back

the lease.

25. This news was as astonishing to me as had been the revelation of Gross' unauthorized trading activities since he had not revealed to me Atlas' offer to buy out the lease despite his knowledge that we could not possibly afford to move into the new premises, nor to the best of my knowledge and belief, did he reveal that offer to any other members of the firm.

26. Gross' concealment of this opportunity was clearly intentional and in my opinion in part designed to avoid that discussion within the firm of the reasons why we were unable to sustain the obligations of the lease which would have brought to light and exposed to all of the partners that Gross' management of the firm had brought it to the brink of financial ruin. Indeed had Gross made the Executive Committee aware of the offer, and of the true extent of its financial disabilities, it is my strong conviction that they would inevitably have accepted the buy-out of the lease in order to eliminate the $5,800,000 liability.

27. The direct result of Gross' suppression of this information was that we were obligated to negotiate our own buy-out of the lease from the landlord at an actual out-of-pocket dollar cost in cash of $430,000. The total loss was substantially in excess of $430,000, may have been as much as $530,000 and was entirely due to the selfish attitude of Charles Gross in placing his own personal interests ahead of the firm or any of his partners.

E. THE LEWIS BRACKER DEBACLE

28. In March 1970 Lewis Bracker became a General Partner in the firm at the exclusive insistance of defendant Gross. I met Bracker in March, 1970 at a party in Los Angeles on the occasion of the opening of our local office there and was unimpressed. Indeed, to the best of my knowledge, his reputation in business dealings was a poor one.

29. Nevertheless, despite my expressed objections to Bracker's joining the firm, his candidacy was vigorously pressed by Gross who avowed he was a life-long friend of Bracker's, entirely trustworthy and able, and that there was no substance whatsoever to the claims of his want of integrity, honesty, etc. By virtue of these assurances I was persuaded to withdraw my objections and Bracker became a member of the firm.

30. Upon information and belief it ultimately emerged that ventures between Bracker and the firm cost us some $60,000, and that Gross had been fully familiar with the unsavory business reputation and want of moral or ethical character of Bracker which facts were never revealed by him to the firm.

Indeed deponent is advised and believes that Bracker was subsequently jailed for acts of securities fraud.

F. GROSS' FALSIFICATION OF THE FIRM'S PROFIT AND LOSS STATEMENT FOR 1969

31. On May 15, 1969 at a meeting of the General Partners, Gross as Managing Partner advised us that he was extremely optimistic as to the future of the firm, projecting an expected profit to the firm for that year of some $500,000.

32. The firm's statement, when finally distributed reflected a loss of approximately $1,000,000.

Gross sought to allay our fears by telling us that gross income had been received at the expected level but that the magnitude of the costs of conversion to computerized operations and straightening out back-office problems was so substantial that the loss was incurred. He insisted that it was an aberration based upon this one-time expense occasioned by the need to remedy back-office ills.

33. Subsequently in my investigations into the financial conditions of the firm I learned from its accountant Mr. Fox and its controller Mr. Wagnes that the loss was actually between $300,000 and $400,000 in excess of that shown on the profit and loss statement. Mr. Fox advised me that he had been instructed by Gross to so prepare the 1969 balance sheet for the firm as to reflect considerably less by way of losses than those actually incurred and that at Gross' insistence as well, substantial quantities of securities not owned by the firm were sold for its account in order to "minimize" the losses for balance sheet purposes. Mr. Fox and Mr. Wagnes both admitted that the balance sheet, when so prepared, did not reflect the financial position of the firm in accordance with generally accepted accounting principles.

34. That very sort of misstatement of the firm's financial position in reports to the NYSE, a matter for which deponent is informed and believes Gross was responsible, was the subject of a severe censure and fine meted out to the firm by the Exchange. Annexed as Exhibit "C" is a copy of the censure

and fine of the firm dated July 23, 1970 which states in part:

> "We are also very deeply concerned with the apparent misstatements made to the Board in answer to Special Operations Questionnaires. As you know, these questionnaires are designed to give the Board a sense of the capital position and operational capacity of the member firm community. Misstatements will not be tolerated.
>
> "The Advisory Committee has found that your firm was guilty of violating Rule 440, SEC Rule 17a-3 and of making misstatements and has determined that you be severely censured and fined before the Board of Governors.
>
> "Your firm is hereby censured severely and fined $25,000 for the Books and Records violation and $25,000 for the misstatements. The Securities and Exchange Commission will be notified of this proceeding."

F. FURTHER DEPREDATIONS BY GROSS

35. In small things as well as large, Gross' lack of candor with the firm was thorough going. I discovered that he had installed a telephone in his house at the expense of the firm; had charged his garage and other personal expenses to the firm and despite our dire economic plight had secretly provided himself with the luxury of an expensive automobile whose lease charges were paid by us.

After his departure he further refused to reimburse the firm for a $500 petty cash chit or for $1,600 in unpaid insurance premiums advanced for his account.

Thereafter his resignation from the firm in express violation of our agreement in or about June, 1970 that none of us would do so prior to December 31, 1970 was yet an additional demonstration of his thoroughly dishonorable conduct.

G. THERE IS NO BASIS FOR ANY RELIEF AGAINST ME

36. Defendants' first counterclaim seeks to impose liability upon me upon the grounds that I allegedly executed the Transfer Agreement and may have received shares thereunder.

37. A copy of the Transfer Agreement is annexed as Exhibit "D". I never became a party to that agreement nor did I ever receive any shares or securities of any kind thereunder, although I clearly consented to it and believed then and now that it was in all respects proper.

38. Accordingly, there being no basis for relief against me, I respectfully submit this claim should be dismissed.

39. As to the second counterclaim against me, the same is likewise based upon my claimed execution of the Transfer Agreement (Answer ¶34). Again in this instance being factually inadequate and accordingly, on the basis of the undisputable documentary evidence, not representing any basis whatsoever for a claim against me.

The third counterclaim is based upon certain claimed threats; the assertion of the "Buckley" claim against defendants and execution of the Transfer Agreement (Answer ¶49).

None of these activities are alleged specifically in the Answer to have involved deponent, nor was I in fact involved in any of these activities. Indeed, deponent resigned as a partner in Newburger Loeb in November of 1970 prior to institution of the Buckley claim and prior to execution of the Transfer Agreement.

40. Accordingly, this claim should likewise be dismissed.

41. The same may be said as to the fourth, fifth and sixth counterclaims, deponent having resigned as a partner in the firm prior to the Transfer Agreement and accordingly having no liability on that account.

Finally, the seventh counterclaim involving alleged interference with a claimed employment opportunity for Gross in 1971 arose long after my departure from the firm and the eighth counterclaim, based upon alleged violation of the anti trust laws is frivolous on its face.

By virtue of all of the foregoing, deponent submits that each of the counterclaims must be dismissed,as against him.

H. CONCLUSION

42. The foregoing may assist the court in providing some of the flavor of the long-term disastrous impact which defendant Gross had on the firm; of his willingness to fabricate, falsify, dissemble, counceal and otherwise conduct himself in a self-centered and self-seeking way without regard to his moral, contractual or legal obligations to his partners, the creditors and subordinated lenders of his firm or the New York Stock Exchange. Some of these items have been made the subject of a proposed amended pleading which deponent is advised and believes was many months ago delivered to defendant Gross' attorney. A true and correct copy of which is annexed as Exhibit "E". For Gross to seek, then, to portray his attempted extortion in demand-

ing cash preferential treatment as a condition of his approving the Transfer Agreement, is but the latest in his dissembling which does not even stop at the courthouse door. Indeed the New York Stock Exchange as recently as March of this year has censured him and prohibited him from having any association with any firm which handles its own customer accounting unless specific approval be given by the Exchange.

As reported in the Wall Street Journal in an article of March 31, 1972, a true and correct copy is annexed as Exhibit "F":

> "Mr. Gross was accused of violating, between April 1970 and August 1970, Rule 402 and Federal Regulations that bar brokers from pledging customers' fully paid-for securities as collateral for back loans to a firm."

For this violation, he was fined $25,000.

43. Based only upon information supplied herein, it is plain that claims of the firm against Gross of which deponent has knowledge approximate well in excess of $650,000. The facts set forth herein, I believe can be proved at a trial or in arbitration demonstrate not only that Gross is not entitled to recover $129,000 or any other sum, but that indeed his liability in actual damages to the firm is vastly in excess thereof.

After his attempt at extorting cash from the firm as the ransom to be paid for approval of the agreement which would save Newburger Loeb, its general and limited partners, its creditors and subordinated lenders, which agreement he sought to hold hostage to his demands, it is nothing less than out-

rageous for him to seek a like result from the court.

On the basis of the foregoing, deponent respectfully requests that all of the motions by plaintiff and the additional defendants on counterclaims be granted, that defendants' motions be denied and that we be granted such other, further and different relief as the court may deem proper.

Sworn to before me this

7th day of July, 1972.

Ned D Frank

NED D. FRANK

Notary Public, State of New York
No. 31-6481960
Qualified in New York County
Commission Expires March 30, 1974

Exhibit A to Frank Affidavit

Restated Articles of Limited Partnership of Lewburger, Loeb & Co. as Amended, dated February 26, 1970,

See Defendants' Trial Exhibit U.

OPENING		ACCOUNT	H.O.	PAGE
2-11-70	32	20-00900	004	1
ART STMT.			S.S. NO. NO.	
2-28-70		707		

ACCOUNT
C/O CHARLES GROSS

IN ACCOUNT WITH

Newburger, Loeb & Co.

MEMBERS

NEW YORK STOCK EXCHANGE
AND OTHER PRINCIPAL EXCHANGES

9 HANOVER SQUARE TELEPHONE (212) 944-6100
NEW YORK N.Y. 10004 CABLE ADDRESS "NEWBRONEND," N.Y.

DATE	BOUGHT, RECEIVED OR LONG	SOLD, DELIV. OR SHORT	DESCRIPTION	PRICE OR ENTRY	AMOUNT CHARGED	AMOUNT CREDITED
			OPENING [illegible] LARGE MARGIN ACCOUNT			
2/09	2000		CITY INVESTING CO	19	38,000.00	
2/09	2000		CITY INVESTING CO	19 1/2	39,000.00	
2/09		2000	CITY INVESTING CO	20 3/8		40,750.00
2/09		2000	CITY INVESTING CO	20 1/2		41,000.00
2/10	100		CITY INVESTING CO	19 1/2	1,950.00	
2/10		100	CITY INVESTING CO	21 1/4		2,112.50
2/19	100		CITY INVESTING CO	19 1/8	1,912.50	
2/19	700		CITY INVESTING CO	19 3/4	13,825.00	
2/19	1500		CITY INVESTING CO	19 1/4	28,875.00	
2/20	1000		CITY INVESTING CO	19 1/2	19,500.00	
2/20	2500		CITY INVESTING CO	19 1/4	48,125.00	
2/20	2500		CITY INVESTING CO	19 1/2	48,750.00	
2/20	6000		CITY INVESTING CO	19 1/2	117,000.00	
2/27			CLOSING BALANCE MARGIN ACCOUNT		283,644.19	
	19500		CITY INVESTING CO	PCS		
			END OF TRANSACTIONS			
LTV	0.00	INT	0.00 YTD LTV	0.00 YTD INT	0.00	FTC W/H

WE MAY HAVE RECEIVED CONFIRMATION FOR TRADES WHICH DO NOT APPEAR ON YOUR STATEMENT. HOWEVER, IF THE SETTLEMENT DATE OF TRADE AS SHOWN ON THE CONFIRMATION WAS LATER THAN THE DATE THAT APPEARS AT THE TOP OF YOUR STATEMENT THE TRADE WILL APPEAR ON YOUR NEXT REGULAR MONTHLY STATEMENT.

PLEASE ADDRESS ALL COMMUNICATIONS TO THE FIRM AND NOT TO INDIVIDUALS AND KINDLY MENTION YOUR ACCOUNT NUMBER.

PLEASE PRESERVE THIS STATEMENT FOR INCOME TAX PURPOSES

E. & O. E. WE SHOULD BE ADVISED IMMEDIATELY OF ANY ERRORS OR OMISSIONS

Exhibit B. to Frank Affidavit

183

FILE COPY

Frank Affidavit Exhibit "B"

ACCOUNT	A.R.	PAGE
32 [illegible]-03900	002	1

S.S.-I.D. NO.

640

[illegible]UNT
[illegible] L.S GROSS

IN ACCOUNT WITH

Newburger, Loeb & Co.

MEMBERS

NEW YORK STOCK EXCHANGE
OTHER PRINCIPAL EXCHANGES

[illegible] TELEPHONE (212) 944-6300
[illegible] CABLE ADDRESS "NEWBROMEND," N.Y.

[illegible] RECEIVED CONFIRMATION FOR TRADES [illegible] AS SHOWN ON YOUR STATEMENT. HOWEVER, [illegible] DATE OF TRADE AS SHOWN ON THE [illegible] LATER THAN THE DATE THAT APPEARS [illegible] STATEMENT THE TRADE WILL APPEAR [illegible] REGULAR MONTHLY STATEMENT.

[illegible] ALL COMMUNICATIONS TO THE FIRM AND NOT TO [illegible] KINDLY MENTION YOUR ACCOUNT NUMBER.

[illegible] THIS [illegible] E. & O.E. WE MUST BE ADVISED IMMEDIATELY OF ANY ERRORS OR OMISSIONS.

DATE	BOUGHT, RECEIVED OR LONG	SOLD, DELIVERED OR SHORT	DESCRIPTION	PRICE OR CUSTOM	AMOUNT CHARGED	AMOUNT CREDITED
0326			OPENING BALANCE MARGIN ACCOUNT		263,644.19	
0421	600		CITY INVESTING CO	18	10,800.00	
0421	2000		CITY INVESTING CO.	18	36,000.00	
0422	1000		CITY INVESTING CO	17 1/2	17,570.30	
0422	1000		CITY INVESTING CO	17 1/2	17,500.00	
			S OF 4-15-70			
0422		1000	CITY INVESTING CO	17 1/2		17,570.30
			S OF 4-15-70			
			XL PREV BUY			
0423	1600		CITY INVESTING CO	17 1/2	28,000.00	
0424			CLOSING BALANCE MARGIN ACCOUNT		355,944.19	
	19000		CITY INVESTING CO	POS		
			END OF STATEMENT			

[illegible] DIV 0.00 INT 0.00 MO: 0.00 YTD DV 0.00 YTD INT 0.00 YTD [illegible]

FILE COPY

Exhibit B. to Frank Affidavit

Exhibit B. to Frank Affidavit

PERIOD ENDING	ACCOUNT	R.R.	PAGE
2-29-72	[illegible]-0170	00	1
LAST STMT.	S.S./I.D. NO.		
12-24-71	797		

[illegible] ACCOUNT
C/O CHARLES [illegible]

IN ACCOUNT WITH

Newberger, Loeb & Co.

MEMBERS

NEW YORK STOCK EXCHANGE
AND OTHER PRINCIPAL EXCHANGES

[illegible] HANOVER SQUARE
NEW YORK, N.Y. [illegible]

TELEPHONE (212) 944-6300
CABLE ADDRESS "NEWBROMEND," N.Y.

DATE	NO. OF SHS. RECEIVED OR (DELIVERED)	SHS. RECEIVED OR (DELIVERED)	DESCRIPTION	PRICE OR RATE	AMOUNT CREDIT	AMOUNT DEBIT
12/24			OPENING BALANCE MARGIN ACCOUNT			
12/28	1000		CITY INVESTING CO	16 3/4		[illegible]
12/31	[illegible]		CITY INVESTING CO	16 1/4		[illegible]
1/31	2000		CITY INVESTING CO	17		[illegible]
2/04	100		CITY INVESTING CO	16 1/8		[illegible]
2/04	100		CITY INVESTING CO	16 1/2		[illegible]
2/04	200		CITY INVESTING CO	16 1/8		[illegible]
2/04	400		CITY INVESTING CO	16		[illegible]
2/04	400		CITY INVESTING CO	16 1/8		[illegible]
2/04	500		CITY INVESTING CO	16 5/8		[illegible]
2/04	[illegible]		CITY INVESTING CO	16 1/4		[illegible]
2/04	[illegible]		CITY INVESTING CO	16 1/4		[illegible]
2/04	[illegible]		CITY INVESTING CO	16 3/4		[illegible]
2/04	[illegible]		CITY INVESTING CO	16 1/2		[illegible]
2/05	[illegible]		CITY INVESTING CO	16 3/4		[illegible]
2/05	1900		CITY INVESTING CO	16 3/4		[illegible]
2/05	2000		CITY INVESTING CO	16		[illegible]
2/05	2000		CITY INVESTING CO	16 1/2		[illegible]
2/29			CLOSING BALANCE MARGIN ACCOUNT			[illegible]
	35000		CITY INVESTING CO	POS		
			END OF STATEMENT			

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E. & O. E. WE MUST BE ADVISED IMMEDIATELY OF ANY ERRORS OR OMISSIONS

DIV 0.00 INT 0.00 MGN 0.00 YTD DV 0.00 YTD INT 0.00

FILE 00

PERIOD ENDING	ACCOUNT	R.R.	PAGE
6-29-70	[illegible]	002	1
LAST STMT.	S.S./I.D. NO.		
5-29-70	685		

[illegible] ACCOUNT
C/O CHARLES GROSS

IN ACCOUNT WITH

Newburger, Loeb & Co.

MEMBERS

NEW YORK STOCK EXCHANGE
AND OTHER PRINCIPAL EXCHANGES

5 HANOVER SQUARE
NEW YORK, N.Y. 10004

TELEPHONE (212) 944-6300
CABLE ADDRESS "NEWBROMEND," N.Y.

DATE	BOUGHT, RECEIVED OR LONG	SOLD, DELIVERED OR SHORT	DESCRIPTION	PRICE OR ENTRY	AMOUNT CHARGES	CREDITS
05 29			OPENING BALANCE MARGIN ACCOUNT		[illegible]	
06 10		4500	[illegible] CITY INVESTING CO	16 1/4		
06 10		7500	[illegible] CITY INVESTING CO	16		
06 10		1300	[illegible] CITY INVESTING CO	15		
06 11			SOLD OF 6-4-70			
		3500	[illegible] CITY INVESTING CO	16 1/4		
06 11		3700	[illegible] CITY INVESTING CO	15		
06 12		100	[illegible] CITY INVESTING CO	15 1/8		
06 24		1600	[illegible] CITY INVESTING CO	15		
06 24		500	[illegible] CITY INVESTING CO	14 1/8		
06 25		500	[illegible] CITY INVESTING CO	14 1/4		
06 25		200	[illegible] CITY INVESTING CO	14 1/2		
06 25		1000	[illegible] CITY INVESTING CO	14 5/8		
06 25		4200	[illegible] CITY INVESTING CO	14		
06 25		500	[illegible] CITY INVESTING CO	14 7/8		
06 26		1000	[illegible] CITY INVESTING CO	15		
06 26		4500	[illegible] CITY INVESTING CO	15		
06 26			CLOSING BALANCE MARGIN ACCOUNT		79,887.45	
			END OF STATEMENT			

YOU MAY HAVE RECEIVED CONFIRMATION FOR TRADES WHICH DO NOT APPEAR ON YOUR STATEMENT. HOWEVER, IF THE SETTLEMENT DATE OF TRADE AS SHOWN ON THE CONFIRMATION WAS LATER THAN THE DATE THAT APPEARS AT THE TOP OF YOUR STATEMENT THE TRADE WILL APPEAR ON YOUR NEXT REGULAR MONTHLY STATEMENT.

PLEASE ADDRESS ALL COMMUNICATIONS TO THE FIRM AND NOT TO INDIVIDUALS AND KINDLY MENTION YOUR ACCOUNT NUMBER.

PLEASE PRESERVE THIS STATEMENT FOR INCOME TAX PURPOSES

E. & O.E. WE MUST BE ADVISED IMMEDIATELY OF ANY ERRORS OR OMISSIONS.

[illegible] 0.00 INT 0.00 MKT 0.00 YTD INT 0.00 YTD T 0.00

Exhibit B. to Frank Affidavit

186

FILE C[illegible]

PERIOD ENDING	ACCOUNT	R.R.	PAGE
7-31-70	8C-00000	00	

LAST STMT.

S.S. I.D. NO.

JOD ACCOUNT
C/O CHARLES GROSS

IN ACCOUNT WITH

Newburger, Loeb & Co.

MEMBERS
NEW YORK STOCK EXCHANGE
AND OTHER PRINCIPAL EXCHANGES

9 HANOVER SQUARE
NEW YORK, N.Y. 10004

TELEPHONE (212) 944-0100
CABLE ADDRESS "NEWBORNEND," N.Y.

YOU MAY HAVE RECEIVED CONFIRMATION FOR TRADES WHICH DO NOT APPEAR ON YOUR STATEMENT. HOWEVER, IF THE SETTLEMENT DATE OF TRADE AS SHOWN ON THE CONFIRMATION WAS LATER THAN THE DATE THAT APPEARS AT THE TOP OF YOUR STATEMENT THE TRADE WILL APPEAR ON YOU[illegible] EGULAR MONTHLY STATEMENT.

PLEASE ADDRESS ALL COMMUNICATIONS TO THE FIRM AND NOT TO INDIVIDUALS AND KINDLY MENTION YOUR ACCOUNT NUMBER.

[illegible]

PLEASE PRESERVE THIS STATEMENT FOR INCOME TAX PURPOSES

[illegible] WE MUST BE ADVISED IMMEDIATELY OF ANY ERRORS OR OMISSIONS

DATE	DEBITS (CHARGES)	CREDITS (PAYMENTS)	DESCRIPTION	PRICE OR RATE	AMOUNT DUE
0724			BEGINNING BALANCE MARGIN ACCOUNT		0.00
0731			CLOSING BALANCE MARGIN ACCOUNT		0.00
			END OF STATEMENT		
0731	0.00	0.00	0.00 MUN 0.00 YTD DV	0.00 YTD INT	0.00

ACCOUNT	M.R.	PAGE
32 00-00000	002	1

S.S. I.D. NO.

21 21

SALES GROSS

In account with

Neuberger, Loeb & Co.

MEMBERS
NEW YORK STOCK EXCHANGE
AND PRINCIPAL EXCHANGES

DATE	DEBIT, AMOUNT PAID OR LOST	CREDIT, AMOUNT RECEIVED OR GAIN	DESCRIPTION	PRICE OR ENTRY	AMOUNT CHARGED	AMOUNT CREDITED	
0129			OPENING BALANCE MARGIN ACCOUNT		80,882.45		21
0222			CLOSE P & L TO 00000709	J/E		80,882.45	27
0226			CLOSING BALANCE MARGIN ACCOUNT			0.00	27
			END OF STATEMENT		**********	**********	

INFORMATION FOR INVESTORS
PAYMENT FOR YOUR SECURITIES PURCHASED AND DELIVERY OF SECURITIES SOLD IS EXPECTED ON THE SETTLEMENT DATE SHOWN ON THE CONFIRMATION UNLESS OTHERWISE AGREED TO IN WRITING. IN ACCORDANCE WITH THE REGULAR METHOD

IN THE EVENT OF

Exhibit B. to Frank Affidavit

Exhibit C to Frank Affidavit

Censure and Fine of Newburger, Loeb & Co.
dated July 23, 1970.

See Plaintiff's Trial Exhibit 86.

Exhibit D to Frank Affidavit

Agreement between Newburger, Loeb & Co. Inc. and Newburger, Loeb & Co., dated December 31, 197[illegible], with Newburger unaudited balance sheet as of December 31, 1970, together with Schedules A-F,

See Plaintiff's Trial Exhibit 24.

Exhibit E to Frank Affidavit

Newburger Amended Complaint,

See Additional Defendants'
Finley, Kumble Trial Exhibit CC.

Exhibit F. to Frank Affidavit.

6 THE WALL STREET JOURNAL, Friday, March 31, 1972

Big Board Fines Newburger Loeb Former Partner

Gross Assessed $25,000 and Censured on Charges of Securities Pledge Breach

Milwaukee Co. Is Disciplined

By a WALL STREET JOURNAL *Staff Reporter*

NEW YORK — The New York Stock Exchange levied a $25,000 fine against and censured Charles H. Gross, former managing partner of Newburger, Loeb & Co., on charges of violation of exchange rules governing pledging of customers' securities.

The exchange also prohibited Mr. Gross from having any association with a clearing member firm (one that handles its own customer accounting) unless the exchange grants approval. "In no event may he be involved in the record keeping and financial operations of a clearing member firm or have otherwise direct or indirect control over a clearing member firm," the exchange said.

Mr. Gross was accused of violating, between April 1970 and August 1970, Rule 402 and federal regulations that bar brokers from pledging customers' fully paid-for securities as collateral for bank loans to a firm.

Mr. Gross, currently a broker at Heine & Co., another member firm, declined comment on the disciplinary action.

The exchange said that subsequent to Mr. Gross' violation all of Newburger Loeb's customer accounts were transferred to another member firm "without losses to any customer." Newburger Loeb, the exchange added, "has been reorganized under new management and is in good standing with the exchange."

The exchange also censured Milwaukee Co. and fined the Wisconsin-based firm $1,000 for violations connected with distributing investment literature to the public. Among other things, the firm was accused of "improperly promoting the success of a past research recomendation."

In Milwaukee, officials of the firm weren't immediately available for comment.

The exchange also censured and levied a $300 fine against J. S. Love & Co., a former member, for failing to submit an advertisement to the exchange for approval before publication. James S. Love, a senior officer of the firm, was said by his office to be in Bermuda and unavailable for comment.

Frank Affidavit Exhibit "F"

Rubin Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,	
Plaintiff,	
-against-	71 Civ. 685
CHARLES GROSS, MABEL BLEICH and GROSS & CO.,	
Defendants,	AFFIDAVIT
NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,	
Additional defendants on Counterclaims.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

EDMUND M. RUBIN, being duly sworn, deposes and says:

1. I am presently employed by Newburger, Loeb & Co., Inc. as supervisor of the Trading and Order Department. Prior to being employed by Newburger, Loeb & Co., Inc. I was employed by Newburger, Loeb & Co. in that same position. I have held that position continuously since 1946.

2. Charles Gross is familiar to me. I have known

Charles Gross for more than twenty-five years. During the latter part of 1969 and the first six months of 1970, Mr. Gross was the managing partner of Newburger, Loeb & Co.

3. During that period of time our accounts were computerized on an IBM computer system with our using an outside service to process and return to us account information with respect to each account handled by Newburger, Loeb & Co. (the "Firm").

4. During this period of time the Firm traded in securities or took position in various securities as a Firm. Accounts which were Firm accounts had a number prefix "42" indicating that said accounts were home office accounts. Such Firm accounts were further identified by a "00900" series designation. That number designation was the number series designation which identified said account as a Firm account in which securities were held or traded on behalf of the Firm.

5. Sometime during the latter part of 1969 I was called in by Charles Gross. I was instructed to open a new account with a "00" prefix designation. That meant that the said account was a "special" account. The daily individual and summary reports that were punched out by the computer service and then broken down and distributed to the various partners and in home office would not show this account because of its "00" designation. Furthermore, that account

would also therefore not appear on the monthly computer punch out sheets reflecting transactions in Firm accounts. Furthermore, the Firm ledgers would not pick up this account as a Firm investment account, but it would be posted to the general ledger.

6. At the time that Charles Gross instructed me to open this account he told me that I was not to tell any of the other partners in the Firm about the account and that I was to make every effort to see that no one in the Firm became aware of said account. He told me that he was trading for the Firm in this account but he didn't want anyone else in the Firm to know about it. During that period of time when reports of executions of purchases or sales of securities came back from the Exchange floor it was our usual and customary practice to send them back to the originator of said order by ordinary conveyor belts or by messenger. In this instance, Gross gave me instructions that I was not to send these items through ordinary chanels, but was to deliver them to him myself as he did not want anyone else in the office to know about the transactions.

7. At the present time I do not recollect the securities traded through that account by Charles Gross completely. I do recollect that City Investing Corp. was one security that Gross traded in heavily in that "00" account

Edmund M. Rubin
EDMUND M. RUBIN

Sworn to before me this
7th day of July, 1972.

Herbert F. Roth
Notary Public

HERBERT F. ROTH
Notary Public, State of New York
No. 31-3372163
Qualified in New York County
Commission expires March 14 1971

Risher Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as assignee of Claims of David Buckley and Mary Buckley,	:	
Plaintiff,	:	71 Civ. 685
-against-	:	
CHARLES GROSS, MABEL BLEICH and GROSS & CO.,	:	
Defendants,	:	
NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,	:	
Additional defendants on Counterclaims.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PAUL RISHER, being duly sworn, deposes and says:

1. I am one of the additional defendants in the above-captioned action.

2. I am presently the President and Chief Executive Officer of the corporation known as Newburger, Loeb & Co., Inc. (the "Corporation").

3. I first became aware of the existence of the limited partnership known as Newburger, Loeb & Co. (the "Partnership") in the Summer of 1970, when my then associate, Robert Muh, and I were consulted by members of the executive committee of the Partnership with regard to whether or not we would accept a management consulting assignment.

4. Bob Muh and I were retained by Fred Kayne, then managing partner of the Partnership, to assist them in taking remedial action designed to remedy the financial crisis in which the Partnership was enmeshed arising out of operating losses; the execution of an injudicious lease at the premises known as One New York Plaza; the acquisition through a subsidiary of a National Basketball Association Expansion Team known as the Buffalo Bills and a myriad of other operational and administrative problems.

5. Our retention was occasioned by the financial difficulties in which the Partnership found itself and was done with the approval and consent of Charles Gross.

6. Bob Muh and I were both trained management consultants having served as consultants at the international consulting firm of McKinsey & Co., for a period of more than three (3) years. During that time, our assignments included the analysis and evaluation of the management of many major corporations.

7. At no time prior to the acquisition by the Corporation of the scheduled assets and liabilities of the Partnership did I have a financial interest in the operations of the brokerage firm operated by the Partnership.

8. From the time in the early Fall of 1970 through February 11, 1971, during which the agreement of December 31, 1970, relating to the transfer of the assets and liabilities from the Partnership to the Corporation was negotiated, I took an active part in the negotiations and in the analysis of the condition of the Partnership, both as a going concern and as a potential candidate for suspension by the New York Stock Exchange and forced liquidation.

9. Mr. Gross' moving papers are replete with omissions of material facts which, any impartial observer familiar with the facts and circumstances surrounding the transfer agreement, would readily acknowledge.

First and foremost of these omissions is the elementary fact that none of the limited partners, subordinated lenders or general partners had any great desire to leave his capital at risk in the brokerage industry during the Fall of 1970 or the early part of 1971. The overriding consideration for the limited partners and subordinated lenders in agreeing to the transfer of assets and liabilities from the Partnership to the Corporation and the concurrent

injection of the One Million Dollars of new subordinated capital was the fact that there was an honest belief by all concerned that the liquidation of the firm would result in almost certain loss of all of the limited partnership capital and a portion, if not all, of the subordinated capital. There was, in my mind, and I believe in the minds of all of the general partners, including those who had withdrawn prior to the execution of the December 31, 1970 agreement, the certainty that, upon liquidation, there would be no capital available for distribution to general partners. Indeed, the Partnership Agreement might require general partners to indemnify limited partners against any loss, and the indemnity looked to the assets of the general partners in addition to those already committed to the Partnership;

I believe that the contention of the Gross defendants that they would have receive their "book" capital value upon dissolution as reflected by the Peat, Marwick statement for December 31, 1970 in the amount of $129,561 for Gross and $75,000 each for Bleich and Donoghue is without merit. Those figures are mere "book" figures. Initially, it should be noted that even accepting said figures at face value, the equity of the general partners was a deficit of $495,250. Since the effect of this is an erosion of $495,250 of the $2,147,865 of the limited partners contribution of capital, the limited partners would have priority over the

general partners. In addition, on the face of the Peat, Marwick financial report it is clear that the above figures were and are subject to the footnotes constituting an integral part of said financial statement. Footnote 8 specifically mentions contingent liabilities totalling $471,000, the bulk of which are still not finally resolved.

Finally, said statement is prepared on an "ongoing business" basis. If the balance sheet were prepared on a dissolution or liquidation basis there is no question that the figures would have been radically changed to further reduce the net worth of the business. Conservatively, considering only three areas, on a dissolution or liquidation basis, the net worth of the Partnership would have decreased by not less than $1,100,000. This would have occurred by necessary changes in three categories alone:

Leaseholds

A. As at December 31, 1970 the Partnership had lease obligations in excess of $400,000 per annum, without considering contractural, future escalations. Most of these lease obligations were in Manhattan, and locations in the financial district accounted for a large part of those leaseholds in Manhattan. In December, 1970, the rental market was a disaster, particularly the financial district. No realtor, attorney or accountant would estimate that the

firm could relieve itself of these obligations in less than a year. (The settlement for the top floor of New York Plaza was 1-1/2 years rent in cash.) Conservetively, we estimated that the writedowns due to leasehold obligations would be at least $400,000.

Furniture, Fixtures and Leasehold Improvements

B. The firm had on its books $595,779 in furniture, fixtures and leasehold improvements. The condition of the brokerage industry and the real estate market made these fixed assets virtually worthless. Leashold improvements accounted for a large part of the total and if we were unable to be paid for these, which seemed likely in view of the market, we might have to pay for their removal. We estimated that we would be lucky to receive 1/3 of the total value for all this category of assets and would have taken a writedown of $395,779.

Legal and Accounting Fees on Dissolution

C. A bankruptcy attorney advised me that a rough estimate for professional fees on a dissolution would amount to about 10% of the total assets or about $370,000 in the case of Newburger, Loeb & Co.

We are not attempting to quantify it here, but it is logical that once a brokerage firm announces dissolution,

its revenues stop immediately, while some salary and other administrative costs continue for awhile. The net dollar cost can be substantial.

10. The good will carried today on the balance sheet of the Corporation represents the difference between the sum of the liabilitities assumed by the Corporation and the securities issued by the Corporation to limited partners, subordinated lenders and certain of the general partners and the book value of the "hard assets" received by the Corporation. That figure today is in excess of $675,000.

11. Putting aside for the moment the offsets and the claims of the Partnership against Gross, Donoghue and Bleich which were assigned to the Corporation, together with the other assets of the Partnership, there is no doubt in my mind that the net result of the transaction was to the benefit of Charles Gross and of each and every person who was at any time during 1970 a general partner. Twenty general partners and former general partners acquiesced in the transaction. Nine limited partnership entities accounting for more than One Million Nine Hundred Thousand Dollars in capital, agreed to the transaction. In addition, six subordinated lenders accounting for more than One Million in capital were in agreement. Both limited partners and subordinated lenders would have come ahead of Mr. Gross in a liquidation.

12. I was a consultant to the Partnership during the very end of the tenure of Charles Gross as managing partner, and my knowledge of the claims against him and the offsets to be asserted in this litigation against him arise only from the statements made to me by the other general partners and their counsel. I relied on those statements and hereby affirm that, whether or not these offsets or claims are ultimately sustained on trial, all parties concerned believed, in good faith, that the offsets and claims existed against Charles Gross. There was no conspiracy. There was, however, an open and forthright business decision made by those involved and their counsel that there appeared to be valid claims and offsets against Charles Gross in excess of any figure which could be established as his capital. I must repeat, at this point, that the Peat, Marwick & Mitchell balance sheet, as of December 30, 1970, relied upon by Mr. Gross, was based on the fact and assumption that the business of the Partnership was continuing. That balance sheet was, of course, prepared subsequent to both December 31st and the consummation of the transaction on February 11, 1971. As detailed above, if a balance sheet were now prepared as of the same date, based on the assumption that the Partnership was to be liquidated on February 11, 1971, the capital accounts of the general partners, limited partners and subordinated lenders would be materially changed. That change would be in the direction of materially reducing the

amounts available for distribution upon liquidation. I believe that it can be established on the trial of this action that neither Charles Gross nor any other partner with the possible exception of Leo Stern, wi h a positive capital position would have had such a positive capital position in the event of liquidation.

13. As to the Buckley claim, I and the other principals involved were informed by counsel that Messrs. Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, the attorneys for David and Mary Buckley in the arbitration proceeding instituted by the Partnership against David and Mary Buckley, had submitted a written counterclaim alleging setoffs and two counterclaims against the Partnership. The st counterclaim involved a charge of churning during a eriod when Gross & Co., a partnership of Charles Gross, Mabel Bleich and Jean Donaghue, was the originating broker for the Buckley accounts. I spoke to Lawrence Berkowitz, who was then serving as our internal house counsel and who had previously served on the staff of the Securities and Exchange Commission and, in particular, the Division of Trading and Markets, and, after a review of the file in this case, he advised me that the churning claim was, on its face, valid and that the number of trades involved in the period of time and size of the account raised a presumption that there had been some wrongdoing.

Mr. Berkowitz further concurred in the opinion of our outside counsel that a claim existed on behalf of the Partnership against Mr. Gross and his partners, since the activities arose prior to the time he became a general partner of the Partnership. I was also informed that the second counterclaim involved a charge of poor investment advice resulting in an additional loss of $458,000 to the Buckleys. Buckley's reply alleged and the trading records confirm trades in excess of one thousand in the Buckley account between 1962 and August, 1966. Counsel for the Corporation were ultimately authorized to prepare a summons and complaint against Gross & Co., not for the purpose of terrorizing Mr. Gross, but to set forth with particularity the basis of at least one of the claims and offsets against him. All during my treatment with Gross and his counsel it was clear to me that Gross wanted more favorable treatment than anyone else.

14. During the negotiations Gross claimed he was a creditor. If the Partnership dissolved all withdrawing partners and limited partners would have claimed the same status. Although we would have liked to reach a settlement with Mr. Gross merely to avoid the unpleasantness of a continuing dispute, at no time did we believe that his consent to the transaction was necessary, since he merely was another creditor whose claim would be assumed by the Corporation. As a creditor he was in the same position as any other creditor whose claim could be disputed on the basis of counterclaims or offsets.

15. As more fully set forth in the accompanying affidavit of John Smith, our Comptroller, the Corporation is solvent and has in excess of Seven and One-Half Million Dollars in equity and subordinated capital. This amount is exclusive of the reserve for the claims of the Gross defendants which have been the subject of a reserve in the liability section of our balance sheet. This reserve has not been because of any acknowledgment of the liability, but because of the insistence of the New York Stock Exchange that we err on the side of caution in presenting our capital structure.

16. It should be noted at this point that the statement made on behalf of the Gross defendants that everyone supposedly knew that the transfer from the Partnership to the Corporation could not go through if Gross, Bleich and Donoghue withdrew their "capital" is just not true. Even accepting their claims at face value without any offset the new Corporation, from its inception, would have been able to pay said amount out and would have been able to continue in business, as with such payment it would still have had adequate capital for business purposes and to satisfy Stock Exchange requirements. Indeed, from its very inception the Corporation set up a liability reserve on its books for this purpose. The reason Gross, Bleich and Donoghue were not paid their claims was not because that money was essential to the Corporation, but because of my good faith and belief that they are not entitled to the amount they claim.

17. I was aware, prior to the February 11, 1971 closing that discussions had taken place between our counsel and counsel for Mr. Gross relating to the possibility of Mr. Gross attempting to restrain the transaction. At one time we were advised that Gross would definitely attempt to restrain the transaction. I was advised one or two days before the closing that Mr. Gross' counsel had advised our counsel that he would not attempt to obtain a restraining order. The relief requested by Mr. Gross insofar as it relates to the appointment of a receiver is outrageous in view of our profitable activities, our recognition of the fact that the Corporation has assumed any liability due to the Gross defendants, subject to counterclaims and offsets, and the fact that the appointment of such a receiver would probably result in the complete suspension of the firm by the New York Stock Exchange and a liquidation under circumstances which again would result in a depletion of the assets of the firm. It would work severe and unjustified injury upon the more than 180 people presently employed by Newburger, Loeb.

18. I had no financial interest in the Partnership and stood to lose nothing if the transaction which occurred on February 11, 1971, had not been consummated. I freely concede that the opportunity to attempt to turn the business of the firm from a deficit operation to a positive operation was a great challenge to me and my associates and that we

ultimately hoped to receive economic benefit from our investment in the Corporation, but, certainly, on the day that investment was made, we were engaged in rank speculation since, had we liquidated moments after investing in the Corporation, our investment would have been completely lost by virtue of the fact that, even without the additional costs of liquidation, the liabilities and securities issued to the former general partners, limited partners and subordinated lenders, exceeded the available assets for distribution even after the infusion of our capital.

WHEREFORE, I respectfully request that the motions made by the Gross defendants be denied in all respects and that the motions of plaintiff and the additional defendants be granted.

Paul D Risher

PAUL RISHER

Sworn to before me this
5th day of July, 1972.

Herbert F. Roth

Notary Public

HERBERT F. ROTH
Notary Public, State of New York
No. 31-3372163
Qualified in New York County
Commission expires March 14, 1973

Stock Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as assignee of Claims of David Buckley and Mary Buckley, Plaintiff, -against- CHARLES GROSS, MABEL BLEICH and GROSS & CO., Defendants,	7 Civ. 685 AFFIDAVIT
NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ, Additional Defendants on Counterclaims.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FRED J. STOCK, JR., being duly sworn, does depose and say that:

1. He is, and at all times relevant to the matters discussed below was, employed by the Department of Member Firms (the "Department") of the New York Stock Exchange (the "Exchange"), 4 New York Plaza, New York, New York 10004, as Assistant Vice President.

2. In such capacity, the undersigned bore responsibility for the supervision of the activities of member firms of the Exchange and of the compliance thereby with the Constitution and Rules of the Exchange, including Rule 325 applicable to the maintenance of net capital by member firms.

3. On or about November 17, 1970, as a result of a conference between certain general partners of Newburger, Loeb & Co., a member firm of the Exchange (the "Partnership"), I sent a letter dated November 17, 1970, a copy of which is annexed hereto as Exhibit A, informing the Partnership that on the basis of certain information as set forth in such letter it appeared the Partnership would be in violation of Rule 325. Such letter also directed the Partnership to maintain excess net capital equal to $400,000 plus the amount of capital withdrawals scheduled to be made within 120 days subsequent to the end of November 1970. As further stated in such letter, the Department advised the Partnership that unless such necessary net capital requirements were met by the close of business on November 20, 1970 or a signed merger agreement was filed with such Department by the close of business on November 20, 1970, the Department would have no alternative but to recommend the suspension of the Partnership under Article XIII of the Exchange's Constitution. Such letter also directed the Partnership to prepare for liquidation in the event of suspension.

4. Subsequent to November 17, 1970, the Partnership undertook to reorganize and the Department, in view of such attempts and in consideration of the agreed extension of capital withdrawals by limited partners of the Partnership and other events, granted an extension of the date within which the Partnership had to accomplish a written plan of reorganization and recapitalization as outlined to the Department. Such extension was set forth in a letter to the Partnership from the Department dated December 23, 1970 which is annexed hereto as Exhibit B. Such letter contemplated that unless a final agreement for the plan of reorganization was accomplished by December 31, 1970 and the formal executed documents filed with the Department on January 4, 1971 or a plan for the discontinuance of the Partnership was implemented by that date, the Department would approach the Board of Governors of the Exchange and ask for the suspension of the Partnership on January 5, 1971.

5. While the formal executed agreement for the reorganization of the Partnership was not received until January 6, 1971, the Department, in consideration of the efforts made by all the parties to accomplish the reorganization, accepted the agreement for consideration pending receipt of all documents, as set forth in a letter of the Department to the Partnership dated January 7, 1971 annexed hereto as Exhibit C, by January 8, 1971 if the reorganization was to be consummated and approved by the Exchange on January 25, 1971 as contemplated by such agreement.

If such documents were not filed by January 8, 1971, the reorganization could not be considered by the Exchange until February 11, 1971 which would require a postponement of the consummation of the reorganization until such date.

6. While the parties to the reorganization were unable to meet the deadline of January 8, 1971 as to the submission of certain documents in order to timely submit the reorganization to the Exchange's Board of Governors, the Department continued to work with the parties to the reorganization; and the proposed corporate membership of Newburger, Loeb & Co., Inc. (the "Corporation") as the successor to the business of the Partnership under the plan of reorganization was posted on January 29, 1971 for consideration by the Exchange's Admissions Committee on February 10, 1971 and the Exchange's Board of Governors on February 11, 1971. The Department's position was that enough extensions to achieve a reorganization had been granted and that February 11, 1971 was the final date by which the proposed reorganization had to be accomplished. During this time the staff made it perfectly clear that, although the Corporation was posted for approval as a member firm, there was no assurance of approval by the Board of Governors.

7. During the period covered by this affidavit up to and including February 11, 1971, it was the position of the staff of the Department that unless the proposed reorganization or

other steps necessary to maintain the capital integrity of the Partnership under the Rules of the Exchange were accomplished, the staff would have to recommend that the Exchange suspend the Partnership as a member firm and direct the liquidation of the Partnership.

Fred J. Stock, Jr.

Sworn to before me this

[illegible] day of June, 1972

Notary Public

WILLIAM R. STEVENS
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-3845560
Qualified in Nassau County
Certificate filed in New York County
Commission expires March 30, 197[illegible]

Exhibit A to Stock Affidavit

Letter N.Y.S.E., dated November 17, 1970
to Newburger, Loeb & Co.,

See Plaintiff's Trial Exhibit 1.

10-13f 2/70

Exhibit B. to Stock Affidavit.

W.D.

NEW YORK STOCK EXCHANGE

215

DEPARTMENT OF MEMBER FIRMS
4 NEW YORK PLAZA
AT BROAD AND WATER STREETS
NEW YORK, N. Y. 10004

December 23, 1970

COPY

Newburger, Loeb & Co.
5 Hanover Square
New York, New York 10004

Attention: Mr. Robert L. Newburger, Chairman Executive Committee

Gentlemen:

In consideration for the executed extension of limited partners' capital withdrawals and the subordination agreement of Betty H. Newburg through January 5, 1971, an extension of time is granted until January 4, 1971, for Newburger, Loeb & Co. to accomplish the written plan and reorganization and recapitalization as outlined in your letter of December 17, 1971.

We expect a final agreement to this plan and reorganization to be accomplished by December 31, 1970 and the formal executed documents filed with this department on January 4, 1971.

If this cannot be accomplished, or if your plan for discontinuing the firm has not been implemented by that date, this department will approach the Board of Governors and ask for your suspension under Article XIII of the Exchange Constitution on January 5, 1971.

Please acknowledge receipt of this letter by signing the enclosed copy and returning it to us promptly.

Sincerely yours,

Fred J. Stock, Jr.
Assistant Vice President

EXHIBIT B

RECEIPT IS HEREBY ACKNOWLEDGED

Exhibit C. to Stock Affidavit.

RSP

NEW YORK STOCK EXCHANGE
DEPARTMENT OF MEMBER FIRMS
4 NEW YORK PLAZA
AT BROAD AND WATER STREETS
NEW YORK, N. Y. 10004

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WILLIAM F. DILGER
OPERATIONS COORDINATOR
(212) 623-6528

January 7, 1971

Newburger, Loeb & Co.
5 Hanover Square
New York, New York 10004

Attention: Mr. Robert L. Newburger

Gentlemen:

An agreement dated as of the 31st day of December, 1970, between Newburger, Loeb & Co., Inc. and Newburger, Loeb & Co., a limited partnership was received late yesterday afternoon. The following points are noted for your consideration:

1) The referred to schedules have not been received by the Exchange.
2) Item 3 of Page 2 refers to a closing on the 25th day of January, 1971. Item (n) requires that the transferee (Newburger, Loeb & Co., Inc.) must be approved as a member firm by the New York Stock Exchange and American Stock Exchange prior to the closing of January 25, 1971.

The earliest date that the Board of Governors can consider your proposal is January 28, 1971 at 3:30 p.m. because of the posting requirements and the necessity for staff review of the pertinent documentation before such consideration. It will be necessary for us to have all documentation as listed below no later than 4 p. m. on Friday, January 8, 1971, or we cannot be prepared for the above Board of Governors' meeting.

1) A pro forma financial statement reflecting the total capitalization of Newburger, Loeb & Co., Inc. as at January 28, 1971, which should include a detailed list of the various classes of stock, debentures and subordinated accounts including the names of the individuals and beneficial owners of such voting, non-voting, preferred, convertible debentures and subordinated accounts.

Exhibit C. to Stock Affidavit.

Newburger, Loeb & Co. January 7, 1971

2) A detailed biographical sketch of Messrs. Reicher and Muh.
3) Certificate of Incorporation
4) Bylaws
5) Stockholders' Agreement
6) Specimen stock and debenture certificates
7) The form in which subordinated loan agreements will be extended and assigned and any such new subordinated agreements.
8) Agreement by member - Agreement by Mr. McGovern, Exchange member who is a holder of voting stock, that he contributes the use of his membership to a member corporation and that in sofar as may be necessary for the protection of creditors of such corporation and subject to the Constitution and Rules of the Exchange, the proceeds of the transfer of his membership shall be an asset of the corporation.
9) Opinion of counsel in form and substance satisfactory to the Exchange stating that the corporation is duly organized and existing, its stock is validly issued and outstanding and that the restrictions required by the Exchange on the transfer and issuance of its stock have been legally effective.

Corporations not organized under the laws of the state of New York shall effectively subject themselves to the following restrictions and the opinion of counsel shall setforth the extent to which the following restrictions shall be made legally effective:

No dividend shall be declared or paid which shall impair the capital of the corporation, nor shall any distribution of assets be made to any stockholder unless the value of the assets of the corporation remaining after such payment or distribution is at least equal to the aggregate of its debts and liabilities, including capital.

10) Our records fail to reflect the receipt of applications for the following participants of Newburger, Loeb & Co., Incorporated:

Fred Kayne
Lawrence J. Berkowitz
Robert L. Newburger
Alex Aixala

Exhibit C. to Stock Affidavit.

Newburger, Loeb & Co. January 7, 1971

Milton Lobel	Estate of Lester Newburger
Erving Lobel	Maybell Blich
Betty Newborg	Jeanne Donoghue
Shirley Newburger	Willard Irle
Albert R. Dworkin	Joseph Quarte
Kinko Polaty	Gerald Frank
Giza Polaty	Jack Wach
Adolphus Roggenbury	Saul Brown
Estate of Morris Newburger	Phillip Shulman

11) Any and all agreements or other documents made or to be made by the corporation or any of its stockholders relating to its management or the issuance or transfer of the securities of the corporation (other than agreements relating to ordinary securities and commodity transactions).

We have received a copy of the clearing agreement as between Newburger Loeb & Co. and W. E. Hutton & Co., dated August 25, 1970. We would require that this agreement be up-dated and executed as between Newburger, Loeb & Co., Inc. and W. E. Hutton & Co..

It is also essential that the above indicated agreement dated as of December 31, 1970, include the consent of Jeann Donoghue.

If these documents are not received by this department by 4 p. m., January 8, 1971, the next consideration by the Board of Governors would not be until February 11. 1971.

I furtner call your attention to the December 23, 1970, letter of Fred J. Stock, Jr. to Robert L. Newburger and subsequent conversations between Mr. Stock and other members of the staff, where the above documentation was requested no later than January 4, 1971.

Very truly yours,

CC: Mr. Robert Huh
Mr. Paul Risher
Mr. Robert Persky
Mr. William McGovern
Mr. Lawrence Berkowitz

McManus Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

- -x

7 Civ. 685

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD V. McMANUS, being duly sworn, does depose and say that:

1. He is, and at all times relevant to the matters discussed below was, a partner in the firm of Peat, Marwick, Mitchell & Co., certified public accountants ("Peat Marwick"), 345 Park Avenue, New York, New York 10022.

2. He was responsible for managing the account of Newburger, Loeb & Co. (the "Partnership"), a member firm of the New York Stock Exchange, as at the date of the financial statements hereinafter referred to.

3. In its capacity as certified public accountants, Peat Marwick rendered its report dated March 25, 1971, on the Statement of Financial Condition of the Partnership as at December 31, 1970 and on the supplementary data included in Schedule 1 attached to such report setting forth the equity of the general and limited partners of the Partnership as at December 31, 1970. Such report, Statement of Financial Condition including the accompanying Notes and Schedule 1 are annexed hereto as Exhibit A.

4. The above report of Peat Marwick gave consideration to the consummation of the reorganization of the Partnership into Newburger, Loeb & Co., Inc. as described in Note 1 of the Notes to Statement of Financial Condition; and the Statement of Financial Condition presents such condition of the Partnership as a going concern and not as an entity in the process of liquidation.

5. Had there been no plan of reorganization or any other intervening event and if the contingent liabilities discussed in Note 8 to the Statement of Financial Condition were determined against the Partnership, the partners' capital accounts would have been adversely affected.

6. The supplementary data in Schedule 1 attached to such Statement and referred to in the above report was prepared and evaluated on the basis of the Partnership being a going concern and any qualification in the above report affecting such supplementary data was made on such basis.

7. Had Peat Marwick been requested to examine the Statement of Financial Condition of the Partnership on a liquidating basis and had there been no plan of reorganization, it would have had to consider, among other things, the affect on partners' equity or deficit of the contingent liabilities arising out of leasehold obligations, the liquidating value, rather than the book value, of fixed assets, leasehold improvements and furniture and fixtures of the Partnership and other contingent liabilities involved in the cancellation of agreements expiring subsequent to a proposed date of liquidation.

Richard V. McManus

Sworn to before me this
5th day of July, 1972.

Notary Public

MARY E. CANNON
Notary Public, State of New York
No. 41-0553475 Queens County
Certificate filed in New York County
Term Expires March 30, 1973

Exhibit A to McManus Affidavit

Letter with attachment from Peat, Norwick, Mitchell & Co., dated March 25, 1971

PEAT, MARWICK, MITCHELL & CO.
CERTIFIED PUBLIC ACCOUNTANTS
345 PARK AVENUE
NEW YORK, NEW YORK 10022

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The Partners
Newburger, Loeb & Co.:

We have examined the statement of financial condition of Newburger, Loeb & Co. as of December 31, 1970. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

As discussed more fully in note 1 to the statement of financial condition, Newburger, Loeb & Co., Inc. (a Delaware corporation) has agreed to acquire the assets and assume certain liabilities of Newburger, Loeb & Co. Also, there are certain contingencies, as discussed in note 8 to the statement of financial condition, of which the final outcome is not presently determinable.

In our opinion, subject to the matters referred to in the preceding paragraph, the accompanying statement of financial condition presents fairly the financial position of Newburger, Loeb & Co. at December 31, 1970, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Also, in our opinion, subject to the matters discussed above, the supplementary data included in Schedule 1 present fairly the information set forth therein.

Peat, Marwick, Mitchell & Co

March 25, 1971

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EXHIBIT A

NEUBURGER, LOEB & CO.

Statement of Financial Condition

December 31, 1970

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Assets

Current assets:		
Cash		$ 133,925
Receivable from clearing broker:		
Commissions and other	$ 157,311	
Floor brokerage	10,869	
Firm trading account	306,067	
Omnibus account	132,390	606,637
Receivable from other brokers and dealers and clearing organizations		17,517
Market value of securities in partners, firm and subordinated accounts:		
Federal, State and municipal obligations	156,275	
Corporate securities	1,024,958	1,181,233
Other current assets		70,495
Total current assets		2,009,807
Other assets:		
Memberships in exchanges, at latest sales prices	300,000	
Furniture, fixtures and leasehold improvements, net of depreciation and amortization	595,779	
Securities not readily marketable, at fair value	23,528	
Receivable from former and general partners	32,424	
Subordinated loan receivable from clearing broker (note 3)	379,016	
Receivable from customers - unsecured (note 4)	116,232	
Cost of securities purchased by clearing broker (note 5)	220,662	
Miscellaneous	21,708	
		1,689,349
		$ 3,699,156

Liabilities and Capital

Current liabilities:		
Payable to customers		36,610
Payable to Atlas Realty Corporation		232,950
Accounts payable and accrued expenses		500,662
Market value of securities sold, not yet purchased		116,304
Reserve for contingencies		59,537
Total current liabilities		946,063
Capital and subordinated liabilities (notes 6 and 7):		
Equities in accounts subordinated to claims of general creditors	1,100,478	
Capital (Schedule 1)	1,652,615	
		2,753,093
		$ 3,699,156

See accompanying notes to statement of financial condition.

NEWBURGER, LOEB & CO.

Notes to Statement of Financial Condition

December 31, 1970

(1) Pursuant to an agreement dated December 31, 1970, Newburger, Loeb & Co., Inc. (a Delaware corporation) agreed to acquire all the assets of Newburger, Loeb & Co., real and personal, tangible and intangible, vested or contingent, of any nature whatsoever, subject only to the liabilities specifically assumed. The corporation agreed to assume the following liabilities:

(A) All liabilities of the partnership shown on the audited statement of financial condition as of December 31, 1970.

(B) All liabilities incurred by the partnership from December 31, 1970 to the closing date in the ordinary course of business.

(C) All liabilities specifically set forth in Schedules A-2, B and C of said agreement which discuss:

1. Lease related liabilities
2. Equipment obligations
3. Other contracts
4. Professional and other services
5. Taxes
6. Miscellaneous
7. Contingent liabilities:
   a. Litigation where the partnership or any of its partners is defendant or where a counterclaim is instituted against any of them.
   b. Potential litigation in which the partnership and/or any of its partners and/or the partnership may be defendant.

The following transactions were to take place at the closing date, February 11, 1971:

1. Limited partners:
   A. Subordinated convertible notes in the aggregate principal amount of $1,315,494 (said amount being 60% aggregate value of the securities and cash contributed by the limited partners as at November 30, 1970 or December 31, 1970 as to securities still held or the amount realized (without commission) if any such securities were sold between those dates, and unpaid interest to December 31, 1970) were to be issued to the limited partners who were party to said agreement.

   B. Series A Convertible Preferred Stock, $100 par value, in the aggregate par value amount of $876,900 (said amount being, with respect to each $100, 40% of the aggregate value of the securities and cash contributed by the limited partners at November 30, 1970 or December 31, 1970 as to securities still held or the amount realized (without commissions), if any, if such securities were sold between those dates, and unpaid interest to December 31, 1970) were to be issued to the limited partners who were party to said agreement.

   Two limited partners with an aggregate capital account balance of $150,000 were not party to the agreement.

(Continued)

NEWBURGER, LOEB & CO. 225

Notes to Statement of Financial Condition, Continued

(1), continued:

2. General partners:

A. Accounts with credit (equity) balances - With respect to each $100 in the capital accounts of former or present 1970 partners at November 30, 1970, exclusive of seven partners, one share of 5% convertible preferred stock, $100 par value, shall be issued. Of the seven partners, four were not party to the agreement.

B. Accounts with debit (deficit) balances - With respect to those former or present 1970 partners whose capital accounts were in deficit at November 30, 1970, the corporation will assume all accounts which have a debit balance of $25,000 or less. For those accounts with a debit balance greater than $25,000, the corporation shall receive personal notes from the individual partners in an amount equal to such debit balance or in certain cases 75% or other percentage of such balance, the remaining debit balances being assumed by the corporation. Certain of these notes were to carry assignments of part or all Federal and state income tax refunds due or to be due to the respective partners. Three partners with deficit balances were not party to the agreement.

3. Subordinated accounts:

A. Non-voting common stock representing 3-1/2% plus 10,100 shares of the Company's issued and outstanding common stock on the date of closing shall be issued pro-rata to the owners of the subordinated accounts at five cents per share.

B. The subordinated accounts and the subordination agreements relating thereto will be assigned to Newburger, Loeb & Co., Inc. and the subordination agreements covering such accounts will be extended to December 31, 1972.

The above-mentioned agreement was signed by all but seven former or present 1970 general partners. All but two limited partners as of December 31, 1970 were party to the agreement and all subordinated lenders as of December 31, 1970 were party to the agreement. The schedule of potential litigation states that the firm may be a defendant with respect to claims of two of the general partners and two of the limited partners who were not party to the agreement for amounts related to their capital accounts and/or rights and obligations under the Restated Articles of Limited Partnership of Newburger, Loeb & Co., dated February 26, 1970, and/or threatened claims arising from or in connection with this agreement and/or damages arising from the "Non-competition" clause in the aforementioned Partnership Agreement.

On February 12, 1971, Newburger, Loeb & Co. ceased to be a member of the New York and American Stock Exchanges and Newburger, Loeb & Co., Inc. was admitted to these exchanges as the successor organization.

(Continued)

NEWBURGER, LOEB & CO. 226

Notes to Statement of Financial Condition, Continued

(2) At December 31, 1970, the firm was obligated under long-term leases with aggregate annual rentals at that date of approximately $530,470. The leases are for various terms with the longest lease expiring in 1979. $73,610 of these annual rentals were subleased at December 31, 1970 or subsequent thereto.

(3) The firm, at December 31, 1970, has subordinated, to claims of general creditors of its clearing broker, $172,399 cash balances and $206,617 market value of securities at December 31, 1970.

(4) Unsecured customers' accounts at December 31, 1970 were in various stages of litigation. Subsequent thereto, settlements have been made in the amount of $74,938. The firm is of the opinion that the remainder of these accounts will ultimately be realized.

(5) Pursuant to the clearing agreement between the firm and its clearing broker, all securities originally held by the firm were to be delivered to the clearing broker within a specified time period. For those securities which were not delivered in this time period, the clearing broker would purchase securities in the open market and the firm would bear the cost. At December 31, 1970, $220,662 represented the cost of such securities net of a reserve for estimated losses.

(6) At December 31, 1970, capital accounts of general and limited partners contained balances remaining in the accounts for partners who have withdrawn during 1970. Under the terms of the Partnership Agreement in effect at December 31, 1970, "The parties hereto further agree that in the event any such partner ceases to be a partner, ... all such securities, cash, other property or interests therein held at the time such former partner ceased to be a partner shall continue to be treated as partnership property and shall be treated for all purposes as capital contributed by such former partner to the continuing or successor partnership or firm for a period of twelve (12) months after the date on which such former partner ceased to be such, during which time ... no withdrawal of any such securities, cash or other property may be made by such former partner or his heirs or personal representatives."

The distribution of the 1968-1969 "Back Office" losses has been made pursuant to an agreement dated May 7, 1970 which was signed by four of the Executive Partners of the 1967-1968 partnership and by six general partners of the 1969 partnership which represented a majority of its votes.

(7) No effect has been given in this statement to any tax refunds which may be received as a result of a carryback of the current year's operating loss.

(Continued)

Notes to Statement of Financial Condition, Continued

(8) Contingencies:

(A) Litigation:

(1) Various actions are pending against the firm, for which claims aggregating approximately $150,000 have been made. Legal counsel is of the opinion that these claims are without merit.

(2) Various actions and claims have been made against the firm, for which claims aggregating approximately $321,000 have been made. Legal counsel is not yet able to express an opinion with regard to the ultimate liability, if any, that the firm may sustain.

(B) Other:

(1) Legal counsel for a former general partner has stated that the capital account balance of said general partner as shown on Schedule 1 is inaccurate except with the possible exception of the amount in his cash capital account. In addition, he has advised that the former partner has substantial claims against the company which they believe are not reflected in any way upon the books.

Legal counsel for a limited partner has also advised that the limited partner has substantial claims against the company which they believe are not reflected in any way upon the books.

(2) Subsequent to April 26, 1970, the date of the last audited examination, the firm liquidated a major portion of the balances in various security difference and dividend accounts by corrective entries, or repurchase or sale of securities. The firm is of the opinion that future liability, if any, as a result of the action taken above would not be material.

NEWBURGER, LOEB & CO.

Schedule 1

Capital

December 31, 1970

Name	Cash and securities capital accounts before distribution: (Debit) Credit net ledger balances in accounts	Market value of securities	Partners' net equity (deficit)	Distributive share of: 1968-1969 "Back-office" losses	Unrealized losses on exchange memberships	1970 operating losses	Total distribution	Partners' net equity (deficit) after distributions
General partners:								
Leo Stern	$ 1,241,379	-	1,241,379	235,401	54,596	277,504	567,501	673,878
Robert L. Stern	620,151	-	620,151	444,650	105,992	538,683	1,089,325	(469,174)
Andrew M. Newburger	325,739	-	325,739	444,650	77,892	314,963	837,505	(511,766)
Robert L. Newburger	881,004	-	881,004	444,650	105,992	538,683	1,089,325	(208,321)
Charles H. Cross	897,603	-	897,603	235,518	103,528	428,996	768,042	129,561
George F. Conniff	25,000	-	25,000	17,842	7,651	22,216	47,709	(22,709)
Edward R. Holt	153,266	-	153,266	42,821	19,271	97,942	160,034	(6,768)
Harold J. Richards	159,258	-	159,258	85,643	31,930	143,244	260,817	(101,559)
Adolphus Roggenburg	200,487	-	200,487	14,274	6,434	32,098	52,806	147,681
Julius S. Schnall	37,372	-	37,372	17,842	8,028	40,808	66,678	(29,306)
John F. Thistleton	-	-	-	3,568	780	1,582	5,930	(5,930)
William A. McGovern	(526)	-	(526)	3,568	2,432	14,741	20,741	(21,267)
Ned D. Frank	136,637	-	136,637	42,821	20,676	88,638	152,135	(15,498)
Sanford Roggenburg	25,000	-	25,000	7,137	3,211	16,323	26,671	(1,671)
John F. Settel	126,949	7,200	134,149	42,821	25,882	139,959	208,662	(74,513)
Richard D. Stern	204,026	2,712	206,738	28,548	16,153	91,615	136,316	70,422
Louis Bracker	25,000	-	25,000	-	3,753	14,307	18,060	6,940
Fred Kayne	50,000	-	50,000	-	7,545	46,439	53,984	(3,984)
Edmund M. Rubin	25,000	-	25,000	-	3,305	26,321	29,626	(4,626)
Jacob Schaefer	12,500	-	12,500	-	1,652	13,160	14,812	(2,312)
Charles S. Sloane	25,000	-	25,000	-	7,545	46,439	53,984	(28,934)
Joseph L. Searles III	-	-	-	-	1,605	5,568	7,173	(7,173)
Robert Therese	50,000	-	50,000	-	6,630	51,541	58,171	(8,171)
	5,220,845	9,912	5,230,757	2,111,754	622,483	2,991,770	5,726,007	(495,250)
Limited partners:								
Estate of Lester M. Newburger	250,000	-	250,000	-	-	-	-	250,000
Estate of Morris Newburger	703,093	-	703,093	176,759	-	-	176,759	526,334
Gerald M. Frank	387,292	8,750	396,042	-	-	-	-	396,042
Willard S. Irle	103,459	-	103,459	-	-	-	-	103,459
Jeanne G. Donoghue	75,000	-	75,000	-	-	-	-	75,000
Mabel Bleich	75,000	-	75,000	-	-	-	-	75,000
Jacob Wachs	61,648	-	61,648	-	-	-	-	61,648
Saul A. Brown	61,648	-	61,648	-	-	-	-	61,648
Benjamin F. Peyser	76,357	-	76,357	57,095	12,473	25,308	94,876	(18,519)
Phillip Shulman	230,718	-	230,718	-	-	-	-	230,718
Joseph W. Quarte	386,535	-	386,535	-	-	-	-	386,535
	2,410,750	8,750	2,419,500	233,854	12,473	25,308	271,635	2,147,865
Total	$ 7,631,595	18,662	7,650,257	2,345,608	634,956	3,017,078	5,997,642	1,652,615

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Schedule 1

dis-tion	Partners' net equity (deficit) after dis-tributions
,501	673,878
,325	(469,174)
,505	(511,766)
,325	(208,321)
,042	129,561
,709	(22,709)
,034	(6,768)
,817	(101,559)
,806	147,681
,678	(29,306)
,930	(5,930)
,741	(21,267)
,135	(15,498)
,671	(1,671)
,662	(74,513)
,316	70,422.
,060	6,940
,984	(3,984)
,626	(4,626)
,812	(2,312)
,984	(28,934)
,173	(7,173)
,171	(8,171)
,007	(495,250)
-	250,000
,759	526,334
-	396,042
-	103,459
-	75,000
-	75,000
-	61,648
-	61,648
,876	(18,519)
-	230,718
-	386,535
,635	2,147,865
,642	1,652,615

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Goldstein Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as assignee of Claims of David Buckley and Mary Buckley,	:	
Plaintiff,	:	71 Civ. 685
-against-	:	
CHARLES GROSS, ABEL BLEICH and GROSS & CO.,	:	AFFIDAVIT
Defendants,	:	
NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHIS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,	:	
Additional defendants on Counterclaims.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SEYMOUR GOLDSTEIN being duly sworn, deposes and says:

1. I am presently employed by Newburger, Loeb & Co., Inc., the plaintiff herein. My position is that of Assistant to the Director of Compliance. I have been in the employ of Newburger, Loeb & Co., Inc. since February 12, 1970. During the period of time from 1957 through February 11, 1970 I was in the employ of Newburger, Loeb & Co. I am personally familiar with the facts

set forth hereinafter.

2. I am familiar with the "Buckley account" and how it was handled during 1962 through 1966. At that time Gross & Co. was a separate and independent brokerage firm. It was a relatively small firm.

3. As many such small firms did at that time it "cleared" through Newburger, Loeb & Co. In the terminology of Wall Street, Gross & Co. was referred to as the "originating house". Newburger, Loeb & Co. was referred to as the "clearing house". What that meant was that the basic customer contact was between the customer (Buckley) and a registered representative of Gross & Co. (Jordan), as the originating house.

4. Once a trade order had been obtained by the originating house (Gross & Co.), the order would be placed by the originating house with the clearing house (Newburger, Loeb). The clearing house (Newburger, Loeb), acting upon instructions from the originating house (Gross & Co.), would execute the order. The order was executed in the name of the clearing house and statements were sent out in the name of the clearing house to the customers. However, that was virtually the total extent of activity of Newburger, Loeb as the clearing house. With respect to the relationship and conduct of the originating house, and its registered representative as to the customer, that was deemed to be the responsibility

of the originating house. Insofar as the Buckley-Jordan relationship was concerned, Jordan was not an employee of Newburger, Loeb, not subject to the control of Newburger, Loeb and, in fact, not controlled by Newburger, Loeb. This was the practice followed with respect to the Buckley account by Newburger, Loeb & Co. and the practice followed by it with respect to all accounts during this period of time as to which Gross & Co. (or any other house for that matter) was the originating house and Newburger, Loeb was the clearing house. Such practice was in conformity with the general and customary practice followed in the financial community at that time.

5. My attention has been directed to a copy of a letter under date of August 24, 1970 from Robert Stern, a copy of which is annexed hereto as Exhibit A, on behalf of Newburger, Loeb, to all partners relating to shares and warrants in a number of companies including Computer Productions, Inc., Computer Software Systems, Inc., Geon Industries, Inc. and Host Enterprises, Inc. Subsequent to August, 1970 and in December, 1970 those securities were carried as capital assets of the partnership and were considered as such in the Peat, Marwick audited financial statement as of December 31, 1970.

6. Annexed hereto as Exhibit B is a true and correct copy of a letter I believe was sent to all partners of Newburger,

Loeb & Co. by Robert Stern on or about August 31, 1970.

Seymour Goldstein

Sworn to before me this

5th day of July, 1972.

Notary Public

HERBERT F. ROTH
Notary Public, State of New York
No. 31-3579155
Qualified in New York County
Commission expires March 14, 1972

PAGES 234 and 235
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Exhibit A. to Goldstein Affidavit.

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Newburger, Loeb & Co.

SOUND INVESTMENT SERVICE SINCE 1899

5 HANOVER SQUARE, NEW YORK, N.Y. 10004 (212) 944-6300

Branch Offices

4 East 28th Street at 5th Avenue
525 Seventh Avenue at 38th Street
67 West 57th Street at 6th Avenue
1900 Ave. of the Stars, Los Angeles, Calif.
2091 Broadway at 72nd Street
931 Madison Avenue at 74th Street
920 Flatbush Ave. at Church Ave., Bklyn.
110 N. Doheny Dr., Beverly Hills, Calif.

Members New York Stock Exchange · American Stock Exchange · Chicago Board of Trade · New York Cotton Exchange · Commodity Exchange · New York Cocoa Exchange

August 24, 1970

To:

The following securities were acquired by Newburger, Loeb & Co. after January 1, 1969 and before February 26, 1970:

535 shares Computer Production, Inc.
18,750 warrants Computer Software Systems, Inc.
4,914 warrants Crown Craft, Inc.
10,000 warrants Geon Industries, Inc.
15,625 warrants Host Enterprises, Inc.
3,600 warrants Tyco Laboratories, Inc.

The Executive Committee has determined that you therefore own an interest in these securities (which may not be readily transferable or marketable) equivalent to your share as a General Partner in the firm's profits or losses as defined in paragraph 6.3 of the Articles of Limited Partnership as of January 1, 1969.

Very truly yours,

NEWBURGER, LOEB & CO.

By: Robert L. Stern

jt: RLS

copies to:
Leo Stern
Robert L. Newburger
Andrew M. Newburger
Robert L. Stern
Charles H. Gross
George F. Conniff
Edward R. Holt
Harold J. Richards
Adolphus Roggenburg
Benjamin F. Peyser
Julius S. Schnall
John F. Thistleton
William A. McGovern
Ned D. Frank
Sanford Roggenburg
John F. Settel
Richard D. Stern

Goldstein Affidavit Exhibit "A"

Exhibit B. to Goldstein Affidavit.

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Newburger, Loeb & Co.

SOUND INVESTMENT SERVICE SINCE 1899

5 HANOVER SQUARE, NEW YORK, N.Y. 10004 (212) 944-6300

Branch Offices

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920 Flatbush Ave. at Church Ave., Brklyn.
110 N Doheny Dr., Beverly Hills, Calif.

Members New York Stock Exchange · American Stock Exchange · Chicago Board of Trade · New York Cotton Exchange · Commodity Exchange · New York Cocoa Exchange

August 31, 1970

To:

With reference to our letter dated August 24, 1970, it has been pointed out to us that the 4,914 warrants for Crown Craft, Inc. are the property of the 1968 partnership, not the 1969 partnership. Therefore, your interest in them, if any, bears no relationship to your share of the 1969 partnership profits or losses.

Please correct your records accordingly.

Very truly yours,

NEWBURGER, LOEB & CO.

By: [signature]

RLS:jt

copies to: Leo Stern
Robert L. Newburger
Andrew M. Newburger
Robert L. Stern
Charles H. Gross
George F. Conniff
Edward R. Holt
Harold J. Richards
Adolphus Roggenburg
Benjamin F. Peyser
Julius S. Schnall
John F. Thistleton
William A. McGovern
Ned D. Frank
Sanford Roggenburg
John F. Settel
Richard D. Stern

Exhibit C to Goldstein Affidavit

Letter from Newburger, Loeb & Co. (Executive Committee) dated August 31, 1970 to numerous persons.

See Defendants' Trial Exhibit YYY.

Lewis Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

71 Civ. Action 685

Plaintiff,

against

AFFIDAVIT

CHARLES GROSS, MABEL BLEICH AND GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, et al.

Additional defendants on Counterclaims

----------X

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

CHARLES E. LEWIS, being duly sworn, deposes and says:

I am a member of the Bar of this Court and an associate with the firm of Willkie Farr & Gallagher. Willkie Farr & Gallagher represented three individuals in the negotiations leading up to and including the transfer of assets from Newburger, Loeb & Co., a New York limited partnership to Newburger, Loeb & Co., Inc., a Delaware corporation. The individuals had placed certain securities owned by them as subordinated capital in the partnership and as a result of the transfer such securities were placed as subordinated capital in the corporation. They were subordinated lenders.

Willkie Farr & Gallagher undertook the representation of its clients in mid-December, 1970. At that time the New York Stock Exchange was about to suspend the partnership from doing business. That suspension would result in a

liquidation of the partnership which would, in turn, result in the loss of all of the general partners capital and substantially all of the limited partners capital and cause considerable expense to the subordinated lenders.

Charles Gross, a resigned partner and a former managing partner of the partnership, indicated at least at one meeting which I attended that he was unwilling to participate in the proposed reorganization.

To the best of my knowledge, none of the primary defendants in this action or their counsel made any attempt to enjoin or otherwise prevent the consummation of the transfer of assets.

It was apparent to me that the firm of Finley, Kumble, Underberg, Persky and Roth ("Finley Kumble") which was representing the new corporation would continue as counsel to the new corporation after the consummation of the transfer - certainly a common occurrence in this context. To my knowlege, none of the primary defendants in this action or their counsel or any other party connected with this transaction made any objection to or, for that matter, any remark concerning any alleged conflict of interest between the new corporation, the partnership and Finley Kumble.

The negotiations leading up to the closing which took place on February 11, 1971 were extensive and represented a compromise of many positions.

On February 11, 1971 attorneys representing various parties - general partners, limited partners, subordinated lenders, the new corporation and the partnership gathered in the offices of Finley Kumble for the closing. None of the primary defendants in this action was present or represented. The partnership was represented by the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil. The executory contract

for the transfer called for the delivery of an opinion of the Rosenman firm to the effect that the partnership had the power and authority to consummate the transaction.

To my amazement and to the apparent amazement of all others at the closing, the attorney representing the partnership refused to deliver such an opinion. He did, however, continue representing the partnership (and, I believe, one or more of the general partners) throughout the closing.

Robert S. Persky, Esq. of Finley Kumble mentioned that his firm had researched the subject matter of the missing opinion and had come to the conclusion that, considering all of the circumstances attending this particular transaction, the partnership had the power and authority to consummate the transaction even though two minor limited partners had submitted written notice of withdrawal of capital. Thereupon all counsel present elected to accept that opinion and consented that Finley Kumble be designated as special counsel to the partnership to prepare a draft of his opinion letter. He thereafter circulated a draft opinion among all counsel and parties present who reviewed the letter. No objection to its form or substance was expressed by any counsel and the letter was retyped in final form and made a part of the closing documents. We then advised our clients to close the transaction.

Charles E. Lewis

Sworn to before me this

14th day of July, 1972.

Mary Catherine Kelly

Steefel Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

NEWBURGER, LOEB & CO.,INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

against

CHARLES GROSS, MABEL BLEICH AND GROSS & CO.,

Defendants,

NEWBURGER,LOEB & CO.,a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL,HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE,ROBERT MUH, PAUL RISHER, CHARLES SLOANE,ROBERT S. PERSKY,FINLEY KUMBLE,UNDERBERG,PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional defendants on Counterclaims

- -x

71 Civ. Action 685

AFFIDAVIT

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ROBERT STEEFEL, being duly sworn, deposes and says:

That I am an attorney duly licensed to practice law in the State of New York and am a member of the firm of Stroock, Stroock, & Lavan,Esqs. I and my firm represented the Estate of Morris Newburger, in the negotiations leading up to and including

the transfer agreement which was executed on the night of February 11,1971. This was a highly complex reorganization which involved considerable discussions and many months of work. Although Charles Gross, a resigned partner and former managing partner of the partnership of Newburger Loeb & Co. had expressed his unwillingness to participate in the proposed reorganization; at no time did he or his counsel prior to the instant litigation express any intention to enjoin or otherwise prevent the proposed transfer agreement from being effectuated. At no time was any claim made by Charles Gross, his counsel, or any other party connected with the transaction concerning any conflict of interest between the proposed new corporation, the partnership, and the Finley,Kumble,Underberg,Persky & Roth firm.

After the circulation of many documents and many conferences involving seventeen counsel a proposed closing was scheduled at the offices of Finley,Kumble,Underberg,Persky & Roth on the late afternoon of February 11,1971.

The attorneys attending the closing had expected that pursuant to the executory contract, the firm of Rosenman, Colin, Kaye, Petschek, Freund and Emil, attorneys for the partnership (Newburger Loeb & Co.) would deliver an opinion letter certifying that in their opinion the said partnership has power and authority to consummate the transaction.

Entirely unexpectedly the young lawyer representing the Rosenman firm did not produce the opinion letter although his firm continued to represent the partnership and their individual clients through the consummation of the transfer agreement, and he informed those present that no partner of his law firm was available to attend the closing.

In view of the fact that the opinion letter was a required document pursuant to the contract of sale and because of the overhanging threat of cessation of business which faced the partnership on the following day because of its threatened suspension from the New York Stock Exchange, all of the counsel present recognized the limited time which was available to meet this problem. Robert Persky,Esq. of Finley,Kumble,Underberg, Persky & Roth,Esqs., who was attending the closing representing the purchaser, made known to the lawyers present that the legal and factual validity of the transfer had been considered by his firm. Thereupon all counsel for the representative parties consented that he be designated as special counsel to prepare a draft of the opinion letter. He thereafter circulated a draft opinion among all counsel and parties present. The letter was reviewed. No objection to its form or substance was expressed by anyone and the letter was retyped in final form and made a

part of the closing documents. The various parties upon advice of their counsel executed the transfer agreement.

ROBERT STEEFEL

Sworn to before me this
day of June, 1972.

ALVIN K. HELLERSTEIN
Notary Public, State of New York
No. 01-6040575
Qualified in New York County
Commission Expires March 30, 1974

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ROBERT STEEFEL, being duly sworn, deposes and says:

Deponent is a member of the firm of Stroock, Stroock & Lavan; that deponent has read the foregoing affidavit and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

ROBERT STEEFEL

Sworn to before me this
day of June, 1972

ALVIN K. HELLERSTEIN
Notary Public, State of New York
No. 31-6040075
Qualified in New York County
Commission Expires March 30, 1974

Itzler Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants.

71 Civ. Action 685

AFFIDAVIT

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional defendants on Counterclaims.

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

RONALD S. ITZLER, being duly sworn, deposes and says:

I am an attorney-at-law licensed to practice in the State of New York, and am a member of the firm of BALLON, STOLL & ITZLER. In the latter part of 1970 and early 1971, I and my firm represented clients in connection with the reorganization of NEWBURGER, LOEB & CO. Our clients were subordinated lenders to

the partnership and a limited partner. Through November, December, January and early February, various meetings and negotiations were taking place looking to the reorganization of NEWBURGER, LOEB & CO. and the creation of a new corporation to be known as NEWBURGER, LOEB & CO., INC. I was aware that one of the general partners, CHARLES GROSS, who had resigned, and who had formerly been managing partner, was unfavorably disposed to the proposed reorganization. Although his counsel had attended various meetings in the course of the negotiations, at no time was I aware of any threat on the part of Mr. Gross or his counsel to enjoin or prevent the contemplated transfer transaction which ultimately took place on February 11, 1971.

At no time was there any claim of there being a conflict in interest in the Finley, Kumble, Underberg, Persky, & Roth's representation of the corporation or in the transaction.

On the evening of February 11, 1971, which was scheduled as the closing date for the proposed transfer transaction, I and many other lawyers representing various parties attended the closing.

On that night, the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil, Esqs. were representing the partnership. The Rosenman firm had been requested to deliver an opinion letter on the validity of the transfer by the partnership of its assets to the new corporation.

In the absence of Max Freund, Esq., of that firm, who was away that night, a junior member of that firm, Paul Burak, attending the meeting, dismayed your deponent when he demurred in delivering the required opinion letter.

Thereafter, Robert S. Persky, Esq., a member of Finley, Kumble, Underberg, Persky & Roth, Esqs., who was representing the corporation at the closing, was requested to act as a special counsel.

Upon information and belief, after considering the question of law and fact, Mr. Persky prepared and circulated the draft opinion to all the parties and their counsel. The draft opinion was reviewed and thereafter put in final form.

The opinion was eventually accepted by Mr. Burak who at the closing, also acted on behalf of Andrew Newberger, a general partner. All counsel present considered the opinion as rendered to be in form and substance acceptable, and advised their clients to proceed with the transaction which was consummated later that night.

Ronald S. Itzler

Sworn to before me this
29th day of June, 1972.

Sheila Goodman

SHEILA GOODMAN
Notary Public, State of New York
No. 31-1506010
Qualified in New York County
Commission Expires March 30, 1973

Ticktin Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

250

- -x

NEWBURGER,LOEB & CO.,INC., as Assignee of Claims of David Buckley and Mary Buckley,

71 Civ.Action 685

Plaintiff,

against

CHARLES GROSS,MABEL BLEICH AND GROSS & CO.,

AFFIDAVIT

Defendants.

NEWBURGER,LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL,HAROLD J. RICHARDS, SANFORD ROGGENBURG,ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY KUMBLE,UNDERBERG,PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional defendants on Counterclaims.

- -x

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

RICHARD TICKTIN, being duly sworn, deposes and says:

That I am an attorney duly licensed to practice law in the State of New York and am a member of the firm of Ticktin, Malkin & Rosenberg.

That on or about February 10,1971, I was retained by Adolphus Roggenburg and Sanford Roggenburg who were general partners in the firm of Newburger Loeb & Co. I was in

attendance at the closing which took place on the evening of February 11,1971 at the offices of Finley,Kumble,Underberg, Persky & Roth,Esqs. I recall that during the course of the proceedings the lawyer from the firm of Rosenman, Colin, Kaye, Petschek,Freund & Emil indicated a reluctance to deliver the opinion letter called for by the executory contract.

I recall that the parties and all other counsel present were taken aback by this unexpected turn of events. Thereafter, it is my recollection that Robert Persky,Esq. of Finley,Kumble, Underberg,Persky & Roth,Esqs. considered the question of the proposed opinion letter.

Mr. Persky commented that he and his firm had previously considered the question in respect of both the law and facts of the proposed transaction. After repairing to his private office, Mr. Persky emerged with a proposed opinion letter in draft which was circulated, read, and reviewed by all the parties and their counsel at the closing.The opinion letter was retyped in final form and reviewed by all counsel. Each attorney thereafter advised their clients to proceed with the consummation of the transaction, which was accordingly accomplished that night.

Richard Ticktin

RICHARD TICKTIN

Sworn to before me this 28th
day of June,1972

Geraldine V. Wilson

GERALDINE V. WILSON
Notary Public, State of New York
No. 24-9695250
Qualified in Kings County
Commission Expires March 30, 1974

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

RICHARD TICKTIN, being duly sworn, deposes and says:

Deponent is a member of the firm of Ticktin, Malkin & Rosenberg; that deponent has read the foregoing Affidavit and knows the contents thereof that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Richard Ticktin
RICHARD TICKTIN

Sworn to before me this 28th
day of June, 1972

Geraldine V. Wilson
GERALDINE V. WILSON
Notary Public, State of New York
No. 24-9695250
Qualified in Kings County
Commission Expires March 30, 1974

Levy Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

253

- -x

NEWBURGER,LOEB & CO.,INC., as Assignee of Claims of David Buckley and Mary Buckley,

71 Civ. Action 685

Plaintiff,

AFFIDAVIT

against

CHARLES GROSS, MABEL BLEICH AND GROSS & CO.,

Defendants,

NEWBURGER,LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS,SANFORD ROGGENBURG,ALDOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY,KUMBLE,UNDERBERG,PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

- -x

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

GEORGE B. LEVY, being duly sworn, deposes and says:

That I am an attorney duly licensed to practice law in the State of New York and am a member of the firm of Silberfeld, Danziger & Bangser.

In connection with the negotiations and reorganization

of Newburger Loeb & Co. during the latter part of 1970 and up to and including the closing which took place on February 11, 1971, I and my then firm of Davidson, Sicher & Levy,Esqs. represented the Estate of Morris Newburger.

At no time was there ever any claim of there being a conflict in interest in the Finley,Kumble,Underberg,Persky & Roth's representation of the corporation or in the transaction.

I recall that on the night of the proposed closing I and all other counsel were startled by the unwillingness of the lawyer representing the Rosenman firm to deliver the opinion letter stating that the proposed transaction was a valid act of the partnership. At no time did I anticipate that there would be an unwillingness to render the opinion which was called for by the contract. Without the opinion it appeared that the transaction would founder.

In the discussions which ensued, Robert S. Persky,Esq. of Finley,Kumble,Underberg,Persky & Roth,Esqs., who had been acting as counsel for Newburger Loeb & Co.,Inc. was designated special counsel for the purpose of preparing a draft opinion on the proposed validity of the transaction. An opinion was prepared that evening in draft, was circulated among the parties and their counsel. The letter was in form and substance acceptable to all counsel concerned with the transfer.

Thereafter the draft opinion was retyped in final form, and became one of the closing documents. After reading over the opinion letter all of the counsel present approved the transaction and the transfer was consummated that night.

GEORGE B. LEVY

Sworn to before me this
day of June, 1972.

IRMA R. STEINBERGER
NOTARY PUBLIC, State of New York
No. 41-9172400
Qualified in Queens County
Commission Expires March 30, 1974

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

GEORGE B. LEVY, being duly sworn, deposes and says that deponent is a member of the firm of Silberfeld, Danziger & Bangser; that deponent has read the foregoing affidavit and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

GEORGE B. LEVY

Sworn to before me this
2nd dayof June, 1972

Irma R. Steinberger

IRMA R. STEINBERGER
NOTARY PUBLIC, State of New York
No. 41-9172400
Qualified in Queens County
Commission Expires March 30, 1974

Bamberger Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NEWBURGER, LOEB & CO., INC. as assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

Defendants,

AFFIDAVIT IN OPPOSITION

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

----------x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MICHAEL A. BAMBERGER, being duly sworn, deposes and says:

I am a member of the Bar of the State of New York and have, since January 1970, been associated with the defendant law firm of Finley, Kumble, Underberg, Persky & Roth, and its successor, Finley, Kumble, Underberg, Persky, Roth & Grutman, first as an associate, and since February 1, 1971 as a member

of the firm. I submit this affidavit in opposition to the motion for summary judgment made by the Gross defendants.

Commencing in the fall of 1970, I participated as counsel in the various matters resulting in the agreement of December 31, 1970 and the closing pursuant to that agreement, as modified, which took place on February 11, 1971.

I have read the affidavit of Robert S. Persky submitted herewith, and support the statements made in that affidavit, to the extent that I was present at the events described. I will not repeat the facts Mr. Persky described but rather will set forth certain facts with which I am more directly familiar than Mr. Persky.

Some question has been raised by counter-claimants as to whether certain general partners received preferential treatment over others. When, in late 1970, it became imperative, because of the financial condition of Newburger Loeb & Co. (the "Partnership") and the resulting demands of the New York Stock Exchange, to recapitalize and reorganize the Partnership, a number of the general partners were in substantial capital deficit. The question arose how they were to be treated in the recapitalization. After extensive negotiations, involving not only my firm as counsel for Newburger Loeb & Co., Inc., (the "Corporation") and counsel for the various general partners, but also counsel for the various subordinated lenders and limited partners, it was agreed that the general partners, other than those who were only minimally in deficit, would sign notes for the amount of the deficit and would assign certain tax refund

claims to secure such notes. This scheme was offered equally to all general partners and, with one exception (Andrew Newburger) was applied equally to all. The de minimis line was drawn at $25,000. Thus each general partner whose deficit was less than that amount was not required to sign a note.

It was considered that the notes would be subject to adjustment, either upward or downward, depending to final audit as at December 31, 1970 by Peat Marwick & Mitchell. However, certain of the general partners were unwilling to accept an open-ended liability without knowing the ultimate amount, preferring, if need be, to file in bankruptcy. Therefore, it was ultimately decided to use the best available figures (which, to the best of my recollection, were the unaudited figures as at November 30, 1970) which would not be subject to adjustment. Thus, the numbers were fixed in the manner that could have been either higher or lower than the deficit as determined on an unaudited basis. These are the figures reflected in February 11 closing documents. As it turned out, the deficits were larger than originally anticipated.

Nor is this a situation where the Partnership transferred its assets to Corporation to avoid the obligations, if any to Gross, Donahue and Bleich. On Page 2 of Schedule C to the December 31, 1970 agreement, the Corporation specifically assumed any liability to Gross, Donahue & Bleich with respect to their capital accounts, rights as partners, etc. While ultimately limited partners have considerably more capital at risk

than counterclaimants agreed to the terms of the December 30, 1971 agreement, Gross consistently demanded better treatment or preferential treatment to his partners.

The issue of the Rosenman opinion as to Section 98 of the Partnership Law has also been raised by the moving papers. A discussion of the background will be helpful. Section 6(d) of the December 31 agreement provided that, as a condition precedent to the obligation of Corporation to close, it was received from counsel to Partnership a written opinion as to the power and authority of Partnership to make the transfer contemplated by the agreement. With respect to the transfer, Partnership was represented by the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil. This condition precedent was waivable by Corporation by the specific terms of Section 6 of the Agreement.

During January and early February, 1971 (prior to February 11, 1971) I had a number of meetings and telephone conversations with H. Paul Burak, a partner of the Rosenman firm. We negotiated some of the terms of the final December 31 agreement and discussed the opinion which the Rosenman firm, as counsel to the Partnership, would be called to give. Mr. Burak on several occasions informed me of the status of his research into Section 98 and the problems he was having finding cases in point. However, at no time prior to the February 11 closing did Mr. Burak state that he would be unable to give the opinion. When on February 11 Mr. Burak did so state, it came as a surprise to those present including his clients. There followed

a discussion as to whether Corporation should waive the opinion. In connection therewith, my firm was asked whether we could give the opinion required of counsel to Partnership. After some discussion, we offered to give the opinion that was ultimately given. It is important to note that the opinion was given at the request of, and without objection, from the fifteen other attorneys present at the closing. No thought was given to adjourning the closing to consider the question since the New York Stock Exchange had given an ultimatum that Partnership would be suspended from membership if the Agreement was not then consummated. The suspension would have resulted in the liquidation of Partnership, and, probably, the bankruptcy of its general partners.

It should also be noted that the transfer agreement, in its final February 11 form, was signed by all eleven of the then general partners of the Partnership, all of the limited partners (other than the two counter-claimants herein), as well as Alex Aixala, Ned Frank, Fred Kayne, Robert Muh, Paul Risher, Adolphus Roggenburg, John F. Settle and Charles Sloane.

Sworn to before me this
1st day of July, 1972

Herbert F. Roth

HERBERT F. ROTH
Notary Public, State of New York
No. 31-3372163
Qualified in New York County
Commission expires March 14, 1973

Michael A. Bamberger

MICHAEL A. BAMBERGER

Lawrence D. Berkowitz Affidavit

AFFIDAVIT

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I, LAWRENCE J. BERKOWITZ, being duly sworn, depose and say that:

1. I am an attorney at law, admitted to practice before the bars of the States of California, New York and the District of Columbia. I was an attorney in the office of Chief Counsel of the Division of Trading and Markets of the Securities and Exchange Commission in Washington, D. C., from September, 1965, through December, 1968. As a result of that experience, I am familiar with the practice, custom and usage of the securities business and the federal regulatory requirements applicable thereto.

2. I was employed as an attorney by the partnership of Newburger, Loeb and Company (hereinafter the partnership) during the period relevant hereto.

3. During November and/or December, 1970, I was contacted by Robert Persky, Esq., of Finley, Kumble, Underberg, Persky & Roth, counsel for the partnership with regard to a pending settlement of an arbitration proceeding involving a claim by the partnership against David and Mary Buckley and counterclaims by the Buckleys against the partnership.

4. As a result of our discussions, Mr. Persky and I agreed that Gross and Company, the firm that introduced the account of David and Mary Buckley to the partnership (the introducing firm) was the party primarily responsible for the supervision of the account and that any counterclaim for mishandling of the account was the responsibility of Gross and Company and its principals, partners and employees.

5. As a result of the conclusions stated in Paragraph 4 above, Mr. Persky and I concluded that as a part of the settlement of the partnership's claim against the Buckleys, it would be appropriate for the partnership to receive from the Budkleys an assignment of any claim they had or may have against the introducing firm, Gross and Company and/or its principal, general partners and employees.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Dated: June 28, 1972

Lawrence J. Berkowitz

LAWRENCE J. BERKOWITZ

Sworn to before me
this 29 day of June,
1972.

OFFICIAL SEAL
LORNA R. BERRY
NOTARY PUBLIC-CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Feb. 17, 1976

1900 Ave. of the Stars, Ste. 2380, Los Angeles, CA. 90067

Lorna R. Berry

Notary Public

Smith Affidavit

parenthesis. The memo he refers to was informative from an arithmetic

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

264

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

7 Civ. 685

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

AFFIDAVIT

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN SMITH, being duly sworn deposes and says that:

1. I am the Comptroller of Newburger, Loeb & Co., Inc. (the "Corporation") and a Certified Public Accountant and have prepared from the books and records of the Corporation the unaudited Statement of Income and Expense for the month ended

May 31, 1972, and the UNAUDITED Year to Date Summary annexed hereto as Smith Exhibit 1 and the UNAUDITED Statement of Assets, Liabilities and Capital as at May 31, 1972, annexed hereto as Smith Exhibit 2;

2. As may be seen from this Statement of Assets, Liabilities and Capital, the Corporation has subordinated debt and capital in excess of Seven and One Half Million Dollars ($7,500,000.00) and has operated profitably for the FISCAL year through May 31, 1972.

As set forth under the caption, "Current Liabilities" (Smith Exhibit 2), we have reserved, without admitting the liability, the sum of $286,500.00 which represents, in our opinion, the liability that may be due to Charles Gross, Mabel Bleich and Jean Donaghue in the event that certain offsets against that amount are not found to be valid.

Any amounts due Charles Gross, Mabel Bleich or Jean Donaghue as a result of partnership liabilities assumed by the Corporation are more than adequately covered by assets of the Corporation in the event of an ultimate adverse judgment and the suggestion that there be a receivership is not at all warranted on the facts.

Sworn to before me this
28th day of June 1972

Nick G. Voris

NICK G. VORIS

PAGES 266, 267 and 268
INTENTIONALLY LEFT BLANK

Newburger, Loeb & Co., Inc.

STATEMENT OF INCOME AND EXPENSE
FOR THE MONTH ENDED MAY 31, 1972

	CURRENT MONTH		YEAR TO DATE
INCOME			
Commissions, including surcharges		$ 412,075	$ 2,538,435
Investments and trading		303,610	1,114,731
Other		118,810	655,270
GROSS INCOME		$ 834,495	$ 4,308,436
EXPENSES			
Direct:			
Clearing charges	$ 148,966	$ 849,526	
Commissions	256,282	1,350,317	
Other	9,219	37,866	
TOTAL DIRECT	$ 414,467	$ 2,237,709	
Indirect:			
Salaries and employee costs	145,051	652,670	
Occupancy	48,999	256,566	
Communications	64,428	290,954	
General and administrative	123,210	563,648	
Interest (Note 1)	26,030	102,738	
TOTAL EXPENSES		822,185	4,104,285
Net income before taxes		$ 12,310	$ 204,151
Income taxes		(11,000)	(76,000)
NET INCOME AFTER TAXES		$ 1,310	$ 128,151

NOTES TO FINANCIAL STATEMENTS

1. Estimate only. Actual interest costs cannot be determined until quarterly and annual reviews of profitability.

2. This liability is shown at the behest of the New York Stock Exchange and does not indicate acceptance of all or any part of the liability by Newburger, Loeb & Co., Inc.

3. Under an agreement, dated October 15, 1971, and approved by the New York Stock Exchange, 1,525 shares of $100 par value Series "A" convertible preferred stock were cancelled in settlement of a disputed charge that arose as a result of "back-office losses" during 1968-1969. Under the terms of the above agreement, all or part of the above shares may be reissued to that shareholder at some future date.

Newburger, Loeb & Co., Inc.

BALANCE SHEET
MAY 31, 1972

ASSETS

CURRENT ASSETS

Cash in bank and on hand	$ 216,123
Amount receivable from clearing broker	88,574
Good faith deposits	20,450
Credit balances in trading and investment accounts at clearing broker	2,194,178
Receivable from customers, net of allowance for uncollectable accounts	21,286
Receivable from brokers, dealers and syndicates	87,552
Other amounts receivable	93,800
Securities held in investment, trading and subordinated accounts	5,994,538
Notes receivable, current	87,094
Prepaid and deferred expenses	27,930
Total Current Assets	$ 8,831,525

OTHER ASSETS

Exchange memberships at market (cost $300,000)	360,000
Notes receivable, long term	81,782
Furniture, fixtures and leasehold improvements, net of depreciation and amortization	441,759
Investments in and advances to affiliates, net of reserves	482,180
Securities not readily marketable, at cost	86,441
Organization cost	20,845
Goodwill	677,040
Total Assets	$10,981,572

Newburger, Loch & Co., Inc.

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BALANCE SHEET
MAY 31, 1972

			LIABILITIES AND CAPITAL
CURRENT LIABILITIES			
Money borrowed from banks			$ 464,726
Payable to brokers, dealers and syndicates			350,420
Dividends payable			36,892
Accounts payable and accrued expenses			627,476
Notes payable, current			33,625
Taxes withheld and accrued			147,774
Securities sold, but not yet purchased in firm's accounts, at market value			981,874
Due to former partners (Note 2)			286,500
Other current liabilities			69,479
Reserve for contingencies			107,526
Total Current Liabilities			$ 3,106,292
OTHER LIABILITIES			
Notes payable, long term			56,333
SUBORDINATED LIABILITIES			
Convertible subordinated notes		$ 1,315,494	
Subordinated accounts		4,678,386	
Total Subordinated Liabilities			5,993,880
SHAREHOLDERS EQUITY			
Preferred stock $100 PV Series A Cv: 11,000 shares authorized 7,244 shares issued and outstanding (Note 3)		$ 724,400	
Preferred stock $100 PV 5% Cv: 11,000 shares authorized 9,514 shares issued and outstanding		951,400	
Common stock .01 PV voting: 1,000,000 shares authorized 842,500 shares issued and outstanding		8,425	
Common stock .01 PV non-voting: 1,000,000 shares authorized 372,101 shares issued and outstanding		3,721	
Capital contributed in excess of par value		103,784	
Retained earnings:			
January 1, 1972	$ (67,576)		
Net income (loss) for the 5 months after provision for taxes	128,151		
Less: Dividends paid in 1972	(27,238)	33,337	1,825,067
TOTAL LIABILITIES AND CAPITAL			$ 10,981,572

Kayne Affidavit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

71 Civ. 685

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

AFFIDAVIT

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTLE, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FRED KAYNE, being duly sworn, deposes and says:

1. I am one of the additional defendants in the above-captioned action and along with Charles Sloane am a claimant against Charles H. Gross in an arbitration proceeding now pending before the arbitration panel of the New York Stock Exchange;

2. As a result of misrepresentations made to me by Charles H. Gross, I became a general partner of the limited partnership known as Newburger, Loeb & Co. (the "Partnership") during

3. On or about August 11, 1970, I succeeded Charles H. Gross as the managing partner of the Partnership;

4. At the time I became managing partner, the Partnership was faced with a multitude of problems, the most critical of which arose during the tenure of Charles H. Gross as managing partner. The critical problems included but were not limited to insufficient net capital to maintain our status as a "clearing firm"; the ownership by a subsidiary of the Partnership of the Buffalo Bills Basketball Team against which there was an existing liability in excess of one million dollars; the existence of the lease on premises not then occupied by the Partnership for a twenty-year period at an aggregate rental of in excess of six million dollars and a general sense of demoralization among the general partners;

5. I also became aware of the fact that Charles Gross had misrepresented to me and to Charles Sloane the capital of the Partnership. The capital of the Partnership was materially less than the $2,206,250.00 set forth in the February 1970 Partnership Agreement. Shortly after my becoming a partner, I also learned that the Partnership, contrary to the assertions of Charles Gross, was not operating at a current profit, was not staffed by competent management personnel and was already operating under restrictions imposed by the New York Stock Exchange;

6. During the early part of 1971, Charles Sloane and I commenced a civil action against Chalres H. Gross in United States District Court for the Central District of California alleging substantially the same facts set forth in this affidavit. Mr. Gross

successfully opposed the continuation of the action in the United States District Court on the grounds that the general partnership interests were not securities and that in any event all disputes between us must be arbitrated before the New York Stock Exchange in accordance with the Partnership Agreement and/or the Rules of the New York Exchange. A copy of the Memorandum Opinion of the Honorable Jesse W. Curtis, United States District Judge dismissing some of the counts in our Complaint and staying others pending arbitration in accordance with the Rules of the New York and American Stock Exchanges is annexed hereto as Kayne Exhibit 1;

7. At the time I became managing partner, the Partnership was represented generally by the law firm of Golenbock and Barell. Because of their close affiliation with Charles H. Gross, both professionally and through friendship, it was decided by the Executive Committee of the Partnership to consult with independent counsel with regard to certain, but not all of the problems, confronting the Partnership. With that thought in mind, we interviewed several firms and finally settled upon the firm that was then known as Finley, Kumble, Underberg, Persky & Roth. We met in the latter part of August with Neil Underberg and Donald Zimmerman of that firm with regard to the possibility of terminating our least at Two New York Plaza (the "Plaza Lease") without economic forefeiture and later that month with Robert S. Persky and Michael A. Bamberger with regard to our general Partnership problems, including, but not limited to, the execution of a clearing agreement with W.E. Hutton. The execution of the clearing agreement was not of our own choosing. We were informed by officials of the New York Stock Exchange that they

considered our ratio of aggregate indebtedness to net capital to be insufficient for purposes of remaining as a clearing firm. We were told that, unless we executed a clearing agreement, the staff would recommend to the Board of Directors of the New York Stock Exchange that the Partnership be suspended from trading;

8. The Executive Committee hired as consultants, at my suggestion, Paul Risher and Robert Muh, both business school graduates and former employees of McKinsey & Company, the international management consulting firm, to assist the management committee in making recommendations for changes in management structure, financial condition of the Partnership and in running the Partnership;

9. By the end of August and the beginning of September 1970, we had met with other general partners and their counsel in attempts to raise additional capital, but those meetings were unsuccessful. The Partnership continued to lose money in each month through January 1971.

10. I am a graduate of M.I.T. and have had substantial business experience other than on Wall Street and my analysis of the situation that existed at the beginning of September in 1970 was that, if the Partnership were liquidated, either voluntarily or because of its suspension from doing business by the New York Stock Exchange, not only would there be insufficient capital to meet the sums due limited partners and subordinated lenders, but that each and every one of the general partners of the Partnership might be forced into personal bankruptcy because of the contingent obligations relating to the Plaza Lease, the Buffalo Bills and other exant leases on premises occupied by the Partnership in New York City

and California. The foregoing are only some of the factors which would have lead to bankruptcy. This view was not shared by me alone but was prevalent among the general partners, including Charles Gross. Subsequent to that time, Max Freund, Esq., of the law firm of Rosenman, Colin, Kaye, Petschek, Freund and Emil analysed the financial conditions of the Partnership and came to the same decision. Mr. Freund believed that even the influx of new capital to the firm might not stave off the personal bankruptcy of the partners. The general partners had attempted to raise substantial additional capital for the Partnership but were unsuccessful in doing so;

11. With the assistance of Finley, Kumble, Underberg, Persky & Roth, we executed a clearing agreement with W.E. Hutton; negotiated a settlement of the Plaza Lease and resolved many other operating problems facing the Partnership. Simultaneously, we proceeded to sell the Buffalo Bills and were represented in that matter by Messrs. Golenbock & Barell;

12. Eventually, Paul Risher, Bob Muh and I conceived the idea of selling the assets of the Partnership to a corporation whose capital structure would be strengthened by the addition of at least one million dollars in capital or subordinated debt. It was our intention at first to raise that sum from among our own contacts, but it soon became clear that the general climate of gloom as to the viability of Wall Street firms would make our task almost impossible. It may be remembered that during 1969 and 1970, approximately 100 members of the New York Stock Exchange were either liquidated or merged in rescue-type operations into other firms;

13. By mid-December of 1970, although negotiations were proceeding for the acquisition by the corporation of the assets and liabilities of the Partnership, we were not yet certain as to the source of our new capital. In the middle of December, I was informed by Robert S. Persky, a partner of the firm of Finley, Kumble, Underberg, Persky & Roth, that one Alex Aixala was willing to subordinate in excess of one million dollars of the common stock of Barcardi Corporation as senior subordinated debt in the new corporation. At that time, we had already been informed orally by the New York Stock Exchange that the staff was prepared to recommend the suspension of the Partnership as a member firm and its liquidation;

14. Between the middle of December and December 31, 1971, negotiations went on continuously between Finley, Kumble, Underberg, Persky & Roth as counsel for the proposed corporation and counsel for the Partnership, Lawrence Berkowitz, Esq., and counsel representing general partners, limited partners and subordinated lenders. It is my recollection that sixteen or seventeen lawyers were involved in those negotiations.

15. After the December 31st agreement was signed the firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil, which was already familiar with the Partnership's problems, was retained to represent the Partnership at the closing.

16. Among the lawyers and law firms who participated in the negotiations on behalf of their respective clients were: Golenbock and Barell; Rosenman, Colin, Kaye, Petschek, Freund & Smil; Davidson, Sicher & Levy; Donald L. Newborg; Daniel Eisenberg; Davis and Davis; Arthur Richenthal; Willkie, Farr & Gallagher, Bear & McGoldrick; Balon, Stohl & Itzler; Stroock & Stroock & Lavan;

17. In the early hours of December 31, 1970, an executory contract was executed between the then remaining general partners, limited partners and subordinated lenders of the Partnership and the corporation. The agreement was subject to approval of the New York Stock Exchange and it was expected that a final closing would be had in late January or early February of 1971.

18. Charles Gross, Ned Frank, myself and other general partners had already served notice that we were withdrawing as general partners and were not signatories on behalf of the Partnership to the transfer agreement.

19. The transfer agreement contemplated the acquisition of substantially all of the assets of the Partnership and all of the known liabilities of the Partnership by the corporation and the influx of new capital to be supplied by Mr. Aixala.

20. The transfer agreement did not cause the termination of the business of the Partnership. The New York Stock Exchange had already informed us in writing that the Partnership would be required to cease business and to be liquidated if we did not consummate the transfer to the corporation. The consummation of the transfer agreement as opposed to the liquidation of the Partnership almost certainly saved the general partners from economic ruin.

21. Charles Gross has claimed that certain shares of stock and warrants were "vested" in him. I do not understand how he can claim that the Partnership could dispose of assets to general partners when it probly could not pay off obligations to limited partners or how it could dispose of assets which should have been calculated on the profit and loss statement vis-a-vis the interest of limited

partners. The memo he relies on was informative from an arithmetic viewpoint but was not intended to be a vesting document.

22. Mr. Gross asserts that I and the other individuals who were to carry the laboring oars in the new corporation were benefited by each purchasing 10,000 shares of voting stock at 5¢ per share because at that time the shares were worth more than 5¢ per share.

Such an assertion ignores the fact that the corporation assumed liabilities in excess of assumed assets and that the only pure equity was the money paid by the shareholders. Even as of May 31, 1972 the corporation still carried a "good will" item as an asset in excess of $675,000 which of course represents the difference between the liabilities assumed and the hard assets received by the Corporation.

Our money, averaging $10,000 per person for the major shareholders, would not have been returned to us had we liquidated the Corporation immediately and received full book value for all assets and had to pay no sums to avoid leases and other obligations. Our funds would have gone to former limited partners and subordinated lenders.

There is no doubt we hoped to turn the firm around and eventually profit from our investment but as of February 11, 1971 our shares were not worth even the amount we were paying for them.

WHEREFORE, I respectfully request that the motion of the Gross defendants for summary judgment be denied.

Fred Kayne

Fred Kayne

Sworn to before me this

HERBERT F. ROTH
Notary Public, State of
No.

Exhibit 1. to Kayne Affidavit

Memorandum Opinion in an action entitled Charles Sloane, Fred Kayne, Plaintiffs against Charles H. Gross, dated August 24, 1971.,

See Exhibit B. of Defendants' Trial Exhibit LLL.

Service of Two (2) sets, each set consisting of Eleven (11) Volumes received February 2, 1977

Rec'd Feb 3, 1976 Fuller Wrangland & Mandel
Attorneys for Defendant-Appellees-Cross-Appellants

Burt Schorr
Attorneys for Additional Defendant on Counterclaims-Appellant-Cross-Appellee

Leon Borstein
Attorneys for Additional Defendants on Counterclaims-Appellants-Cross Appellee, etc

Raymond J. Heslin
Attorney for Additional Defendant on Counterclaims-Appellant-Cross Appellee

Additional Defendant on Counterclaims-Appellant-Cross Appellee pro se

Service of one (1) set admitted Kaplan Kaplan & Dandett
Attorneys for Plaintiff-Appellant-Cross-Appellee, Newberger, Loeb & Co.
By: Donald H. Kaplan

Additional Defendant on Counterclaims Appellant-Cross-Appellee Pro se

Osmond K. Fraenkel - Service of 1 set admitted
Attorney for Additional Defendants on Counterclaims-Appellants-Cross-Appellees Newberger, etc